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Membership

This issue of the Journal goes to 12,106 members—not to mention exchanges and others who receive it for various reasons. This is the largest membership in the history of the Association, but there is no reason why it should not be increased to double that number within a comparatively brief period. It all depends on the individual members.

Perhaps the main difficulty with the individual member is that he thinks in too large numbers. He understands, as he was told at the last annual meeting of the Association, that ten, fifteen or perhaps fifty thousand new members are wanted. The mere magnitude of such a plan tends to dwarf his idea of the importance of individual effort. It clearly seems something that must be engineered, directed, "put over," as the saying goes, by some very large official agency. Now the simple fact is that, no matter how large the plan may be, his part in it is as simple as it is important. All he has to do is to get one or more of the legal brethren he comes in contact with day by day to join the organization. He need lose no time or effort in doing it. He may make the suggestion, or argument, as casually as he pleases, under the most casual conditions. If some of his acquaintances are not receptive, some others are pretty sure to be.

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JOURNAL
ISSUED BY
AMERICAN BAR ASSOCIATION
DECEMBER, 1920

Election and Inauguration

The present situation calls attention particularly to the propriety of the action taken at the last annual meeting of the American Bar Association in favor of a change of the inauguration date which will bring the election and inauguration closer together. At that meeting Mr. William L. Putnam, of Massachusetts, again pointed out the inconvenience which might arise in the conduct of our foreign affairs during the "interregnum" of four months, if an existing administration should be defeated. During this period an administration unsuccessful at the polls can hardly speak with the same authority as before, while the administration which the nation has chosen cannot speak at all. There is no intention here to argue that embarrassment is likely to arise in this or any other particular case; but unquestionably grounds for such embarrassment exist in a situation so anomalous from a practical standpoint, and it is surely the part of wisdom to remove them. A constitutional amendment would be necessary to effect the change, as the committee pointed out.

Judge Evans on the Immigrant

Now that the whole immigration question again presents itself as one of supreme importance to the nation, it is interesting to note that the views of Judge Evan Evans, of the Circuit Court of Appeals of the Seventh District, printed in the November issue of the Journal, have attracted favorable attention. Commenting on them, the Chicago Daily News states that "they contain many valuable and thoroughly practical suggestions to members of Congress and students generally of the twin questions discussed, namely, immigration and naturalization In fact, a whole legislative program is outlined in Judge Evans' observations, which comprise six definite proposals."

Judge Evans believes—it points out—in keeping the doors open to deserving foreigners, but he advocates notable improvements in methods of dealing with immigrants. Among these the suggestion that they be required to learn English during a five year probation period, under penalty of deportation, and the demand for legislation providing that naturalization privileges may be revoked on commission of any one of certain designated offenses are perhaps the most notable. The article continues:

> America is for Americans, Judge Evans well says, in the broad enlightened sense that only those who wish to become citizens and useful, honest members of the great community should be welcomed and permitted to stay. Those who do not value American institutions and are not appreciative of American advantages have no possible claim on the hospitality of the nation. But there is still ample room for thrifty, upright, industrious, well intentioned foreigners who desire to contribute to the welfare of the country, while taking legitimate advantage of its exceptional opportunities.

Judge Evans properly emphasizes the fact that immigration and naturalization in this country are a valuable privilege for which the nation should not hesitate to exact wise safeguards and compensations. In the immigration rush of certain years preceding the war there was a tendency on the part of too many immigrants to forget this. It would have a salutary effect to bring this important fact more clearly to their minds.

Mexico—Past and Present

The review of the conditions along the Mexican border at the time Diaz was applying for recognition by the Hayes administration, printed elsewhere in this issue, is extremely pertinent and not

without its element of encouragement. As pointed out in the article, the similarity in conditions then and those with which we have recently been familiar is really startling. There were the same difficulties about invasions of American territory by Mexican bandits. Curiously enough, exactly the same method of rebuke was adopted nearly forty years ago, in the form of the military expedition to chase bandits, which was employed by the present administration. There were the same complaints and counter-complaints, the same irritations and no doubt, on the part of many people, the feeling that the situation was insoluble and that ultimate conflict between the two nations could not be avoided.

And yet, as difficult as the situation was in those times, its problems were solved sufficiently, at least, to permit recognition by this country and to pave the way for friendly relations for many years, for the development of satisfactory commercial and business connections between the two countries. If such proved to be the case under conditions of such difficulty in those days, there is surely reasonable ground to hope for a similar fortunate issue out of the recent troubles between the two nations. Already there are some indications that things are taking a turn for the better. President Obregon's general attitude, the exchange of visits between him and the executive of the great state of Texas, his peaceful accession to the presidency, and the temporary cessation, at least, of border raids and other aggravations are well known and are cause for general congratulation. The difficulties which have arisen in regard to American personal and property rights in Mexico itself are of course not to be settled at a word. But with the will to live on just and friendly terms clearly manifested, the problem will be already half solved.

"Affected With a Public Interest"

We are at a time when the phrase, "affected with a public interest," in connection with the exercise of the police power, is becoming of more and more significance. The Kansas legislation, providing for the regulation of certain industries, legislation in New York and elsewhere on the subject of rent regulation, and the possibility of attempts at still further experiments in this direction have brought the question prominently before the public mind. In a recent address before the New Hampshire Bar Association, Hon. George W. Wickersham, formerly Attorney-General of the United States, makes some pertinent observations as to the possibilities which lie in the Kansas statute for the settlement of industrial disputes.

"If the whole industry of the manufacture or preparation of food products," he says, "may be involved in a public interest and regulated at will by the legislature, it need not stop, as does this act, with the process of converting the products of the soil from a natural state to a condition to be used for food, but it may reach back to the farmer, determine the conditions under which he shall labor and employ others to work for him, the prices he may charge for his crops, and the methods by which he may dispose of them. Indeed there would seem to be no limit to the legislative discretion, and the individual no longer can say, 'Shall I not do what I will with mine own?'

"'Because,' as Aristole says," he continues, "'all governments rest on the principle of self-preservation, and at times extreme measures must be allowed,' which is the philosophy upon which rests the police power of the state, are there to be no limits upon the right of the legislature to interfere with and control the conduct of every man's business, to regulate the cost of his product and the price of his wares? If so, why are constitutions written and bills of right formulated? These are questions which naturally suggest themselves to lawyers, as they consider such statutes as the latest Kansas remedy for settling industrial disputes, and the judicial interpretation of the constitution which would seem to sanction its enactment."

The rent regulation laws passed in New York likewise present very interesting questions as to the limits of the police power. "The question, therefore, in every aspect in the end," says the able brief filed by Hon. Wm. D. Guthrie and Julius Henry Cohen, in the Appellate Division of the Supreme Court, in a case involving these laws, "resolves itself into the inquiry whether the enactments under consideration are valid exercises of the police power of the state. We have it on high authority that 'the police power extends to all great public needs' and that 'it may be put forth in aid of what is held by the prevailing majority or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' (Holmes J. in Noble State Bank v. Haskell, 219 U. S. 104, 111.) It is not for a court to find that the measure before it is the wisest or the best that could be enacted; the only judicial duty is to say whether, in any aspect, a reasonable legislative discretion could view the law in question as not arbitrary and as desirable in the public interest."

In the District of Columbia a rent regulation statute has been declared totally invalid, but a scholarly article on the regulation of rents by Henry H. Glassie, in the Virginia Law Review, points out that the decision turned on the right of a landlord to possession, and that no question of fair rent was involved. "If the primary operation of the act," the article states, "in regulating rents is not dependent upon its secondary operation in protecting occupancy, it would seem that the case did not present for decision, either directly or by necessary implication, the power of Congress to regulate rents or the validity of the provisions directed to that end. * * * * Until passed upon by the Supreme Court of the United States, these important constitutional questions must be regarded as open."

A Hair-Breadth Escape

Gentlemen who read their names in print are seldom aware of the eternal vigilance necessary to protect them from typographical mischance. Mr. Rigby Swift, K. C., recently appointed to the King's Bench Division in London, mention of which was made in the November issue of the JOURNAL, appeared in the proof as "Mr. Rigby Swift, Kansas City." No doubt, a resident of that flourishing city would regard the printer's emendation as eminently flattering, even at the cost of losing a legal title.

PERMANENT COURT OF INTERNATIONAL JUSTICE

Various Problems Solved by Commission Appointed by Council of the League of Nations to Submit Plan for Tribunal to Determine Justiciable Questions*

By Elihu Root

GENTLEMEN OF THE ASSOCIATION: It is a pleasure to take part in this series of discussions because I think it is a very valuable and praiseworthy project on the part of the Association, and I am glad to be able to contribute what I can by talking for a few minutes about the subject scheduled for this evening. It is a very proper subject to discuss here, because this Association has had something to do with it. When the constitution for the League of Nations was proposed and published by the conferees at Paris with a request for suggestions, the Special Committee of this Association upon International Law held a meeting for the purpose of considering what they ought to do in that field. The result of that meeting was that there was a unanimous resolution passed, without reference to party, race, creed or previous condition of servitude, by the Committee, recommending and urging that there be included in the agreement or League of Nations, the following:

> The High Contracting Powers agree to refer to the existing Permanent Court of Arbitration at the Hague, or to the Court of Arbitral Justice proposed at the Second Hague Conference, then established, or to some other arbitral tribunals, all disputes between them, including those affecting honor and vital interests, which are of a justiciable character, and which the powers concerned have failed to settle by diplomatic methods. The powers so referring to arbitration agree to accept and give effect to the award of the Tribunal.
>
> Disputes of a justiciable character are defined as disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the nature and extent of the reparation to be made for any such breach. Any question which may arise as to whether a dispute is of a justiciable character, is to be referred for decision to the Court of Arbitral Justice when constituted, or, until it is constituted, to the existing Permanent Court of Arbitration at the Hague.

That resolution was communicated to the Secretary of State of the United States, and was cabled by him to Paris. After the communication to the gentlemen at Paris, an amendment was made to the League agreement. I will say nothing because I know nothing on the question whether this was *propter hoc* or simply *post hoc*. The substance of the amendment was to include in the Convenant for the League the definition as to justiciable questions given in the resolution of the Committee of this Association upon International Law. That resolution, as I understand, was subsequently approved by the Association in plenary session. The article of the League Covenant originally reads as follows:

> The members of the League agree that whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration.

That is the way it stood before, and being simply an agreement to arbitrate questions recognized as being suitable for arbitration, didn't amount to very much. But the amendment inserts the following words:

> Disputes as to the interpretation of a treaty, or as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach are declared to be among those which are generally suitable for submission to arbitration.

Then it goes on:

> For the consideration of any such dispute the Court of Arbitration to which the case is referred shall be the Court agreed upon by the parties to the dispute or stipulated in any convention existing between them.
>
> The members of the League agree that they will carry out in full good faith any award that may be rendered, and that they will not resort to war against a member of the League which complies therewith. In the event of any failure to carry out such award, the Council shall propose what steps should be taken to give effect thereto.

You will see that that carries into the article in a general way the definition of justiciable questions included in your resolution. That is a long step forward because what are known as the Taft Treaties of Arbitration, treaties negotiated while Mr. Taft was President, between the United States and France and between the United States and Great Britain, failed because they provided for referring to arbitration all justiciable questions and the term "justiciable" was deemed so general and vague, so without any precedent upon which to draw the line as to what was justiciable and what was not, that it was considered that an agreement to refer to arbitration all justiciable questions would involve or might involve all sorts of questions, whether of policy or of right. This definition obviates the chief objection which led to the failure of the Taft Arbitration Treaties.

In the League Covenant it is also stated in Article 14 that—

> The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Sometime in the early spring I received an invitation from the Council of the League of Nations, identical with an invitation which was sent to some dozen gentlemen residing in different nations, inviting us to become members of a Committee, or as they call it on the other side, a Commission, to devise and recommend a plan for the Permanent Court of International Justice which the League Covenant required the Council to formulate and to submit to the members of the League for adoption. The invitation was to prepare and recommend to the Council of the League a plan by which they might comply with this provision of Article 14, which required them to formulate and submit

*Address delivered by Hon. Elihu Root at the House of the Association of the Bar of the City of New York Thursday evening, Oct. 21, 1920. Reprinted by permission from Bulletin No. 4 of the Association of the Bar of the City of New York, November, 1920.

a plan for a Permanent Court of International Justice.

For many years, people concerned with international affairs have realized that one difficulty about arbitration is that arbitrators too often are apt to treat the cases brought before them as a matter for settlement, for adjustment. They have come to consider, apparently, that their function is to do with the case what seems to them to be the wisest and most expedient thing for all parties and all interests concerned. They tend to act under a sense of diplomatic obligation rather than under a sense of judicial obligation. The great difficulty about arbitration has really been not that nations were unwilling to submit questions of law, questions of right, the kind of questions that our courts pass upon as between individuals in municipal law, to impartial judgment, but that they had not much confidence in getting impartial judgment because they found that the arbitrators, when they got together, went into negotiation as diplomats, and no one could tell what would come out of it. The party having no matter how strong a case, no matter how absolutely right upon the question of legal right, might find itself defeated because it seemed to the arbitrators on the whole that it perhaps would be better that it should not have its legal rights, but that the case should be settled as conveniently as possible.

Now, this proposed Permanent Court of International Justice was designed to differ from the ordinary arbitral tribunal in that respect. It was designed to be a court in which judges would sit and decide according to law, and let the consequences take care of themselves. And that was the problem presented to this Committee which met at the Hague in the second week of June last.

The Committee was composed of members from ten different countries. Lord Phillimore from England. M. de Laparadella from France. Baron Descamps from Belgium. Judge Loder from Holland. Mr. Hagerup from Norway. Mr. Altamira from Spain. Mr. Adatci from Japan. Mr. Ricci Busatti from Italy. Mr. Raoul Fernandez from Brazil. And myself. Nobody represented any government. We were called there as experts purely and on just as purely expert work as if a lot of engineers had been called together to propose a plan for a bridge.

At the outset, one might suppose that it was quite a simple thing to get up a plan for a court, but there were some very serious difficulties involved.

A plan had been prepared at the urgent instance of the American delegates to the Second Hague Conference in 1907—a plan for a permanent court of international justice. The name that was given to it then was the Court of Arbitral Justice, and that was the name that found its way into our Bar Association resolution—referring to the "Court of Arbitral Justice" proposed at the Second Hague Conference. A general scheme of a Court was devised in 1907 and reported to the Second Hague Conference—and was adopted. But, it didn't take the form of an operative convention or treaty because it was found impossible to agree upon the constitution of the court. That is, it was found impossible to agree upon the way in which the judges should be selected. There was a certain jealousy or suspicion or prejudice or perhaps just apprehension on the part of the small countries towards the big countries which made the small countries unwilling to allow the big countries to have a voice in the creation of the court, in the naming of the judges, proportionate to their size, proportionate to the influence they thought they ought to have. On the other hand, the big countries were not willing to allow the great numerical preponderance of small countries to override them and to make up the court by overwhelming them with their votes. Great Britain and France and Germany and Russia would not consent that Luxembourg and Switzerland and Hayti and San Domingo should outvote them. There was no question about that in their minds. So that the great countries would not consent to a vote in which each country was to have a voice—an equal voice—in the selection of the judges, and the small countries would not consent to a vote in which the big countries had any greater voice than each of them had. There the thing stopped, and the Court failed in 1907 upon that.

It was a serious difficulty, and many efforts had been made in the meantime between 1907 and the coming on of the war to try to get over that—but, without success.

Now, in making up the plan of the court, this committee, sitting at the Hague, adopted a plan for dealing with this subject, which was taken very largely from the experience of the Government of the United States. It was pointed out that in 1787, when the Constitution of the United States was framed, just such a question presented itself to the Convention. There were the big states, and they weren't willing to be overdone by the numerical superiority of the small states; and there were the small states, not willing to yield their equal rights and give the big states any greater voice in the government of the country than they had. And that was settled by making the two legislative bodies and giving all the states an equal voice—great and small—in the Senate, and giving the population its voice according to numbers in the House of Representatives, so that Nevada has just as much voice in the Senate as New York, while New York has forty-three times the voice in the House that Nevada has. Now, there was a practical adjustment of just the same kind of a difficulty, and after months of discussion, the Committee came to a realization of the fact that, after all, this was a mere adjustment of means to an end. It wasn't a question of sovereignty. Many of them came to the meeting firmly resolved never, never to surrender the sovereignty of their small countries,—not to yield one jot or title. But, they finally came to the conclusion that after all this was a court in which the sovereignty of everybody was liable to be limited by judicial decision, and that no one had a right to have that done, but it must be done solely by consent. So it wasn't a question of the exercise of sovereignty; but, it was a question of consent—to be given by sovereigntv, and the question of sovereignty was satisfied if everybody had the same right to consent or refuse to consent.

Following that line it was perceived that under the organization of the League of Nations—an organization which would be inevitable under any sort of international organization quite independent of specific and particular provisions in the Covenant of the League of Nations—there were two bodies organized on exactly the same principle as

the Senate and the House of Representatives of the United States; the Council, in which the big states were predominant, and the Assembly, in which the small states were predominant, and accordingly the question of electing the judges was settled by providing that they should be elected just exactly as laws are passed by our Congress, requiring in the election of a judge the concurrent, separate votes of both of those bodies, just as the passing of a law in the Government of the United States requires separate and concurrent votes of both the bodies of the national legislature. Then the difficulty that they might not agree was met by importing bodily into the system our American Committee of Conference, in which so many thousands of laws have been thrashed out and settled upon when it seemed impossible that the Senate and the House could agree; and provision was made that if, after a certain number of votes, there wasn't an agreement, a committee of conference was to be appointed, and that they were to have full scope and find somebody whom they could recommend to both houses for election. And on that basis, that old bugaboo of 1907 was dissipated, and that is the way in which the court is now proposed to be organized. You will perceive that that is essentially fair because it enables each party in the community of nations to exercise a veto against unfairness by the other. The Assembly can always prevent the Council from being unfair. That is, the small nations in the Assembly can always prevent the big nations from being unfair. And the big nations, small in number, in the Council can always prevent the small nations, in great number in the Assembly, from being unfair. They can each force fair treatment of the subject and effect a satisfactory solution.

Then, there was another question which was very serious, and that was the question of jurisdiction. The plan of 1907 provided for no obligatory jurisdiction. It merely provided that this court was to have jurisdiction over all questions—international questions—submitted to it. But, here was a provision in the Covenant of the League, that all questions, disagreements, disputes, which were not submitted to arbitration, were to be sent to the Council or brought before the Council. Now, the Council was not a body of judges. It was a body of diplomats. The obligation of a member of the Council is not to do justice as a judge, but to protect the interests of his country for which he casts his vote, and the natural effect of giving the option either to arbitrate or to go to the Council would be that the nations which felt their case to be weak in a matter of law or justice, would always refuse to arbitrate and instead go to the Council where it could be negotiated. Accordingly we came to the conclusion that we ought to have obligatory arbitration upon questions of strict legal right, and we put that into the plan, in the exact words of the resolution of this Association and of the amended Article 13 of the Covenant which embodied those words. We provided that the court should have jurisdiction of all questions that were submitted by both parties—international questions—and should have jurisdiction over all questions of international law, interpretation of treaties or of the direct effects of the obligation over which the dispute arose.

There was one other subject which was quite important, and that was the question whether countries in litigation were to be represented in the court. That was a difficult subject because the first answer if you were to ask any national or municipal lawyer would be—no. Yet, upon very full consideration we all came to the contrary conclusion, and I have no doubt that it was quite proper. Of course, there are representatives of many countries in the court. Every member of the court comes from a different country, and we had a provision that no more than one shall come from one country, but few small countries can be included in the court, and so we provided that a country not included in the court should have a right to have a judge of its own people put into the court for the purposes of that case. And the reasons for it are these: The greatest obstacle to doing justice as between nations is a failure of nations to understand each other. I don't believe anybody can appreciate that without actual experience. Many years ago I was called upon to argue in the Supreme Court of the United States a case relating to the effect of a French judgment in this country. I see Mr. Coudert in front of me smiling because he remembers the case. There had been a suit brought by the administrator of the old firm of Alexandre, the maker of kid gloves, against A. T. Stewart & Company over some contract for gloves. The suit was brought in Paris, and judgment was obtained there, for I don't remember how many millions of francs, and suit on that judgment was brought here in the Circuit Court of the United States. Judge Wallace held the judgment to be conclusive, and he at that time said that it would be merely impudent for us to assert that the French system of obtaining justice was not just as good a system for doing justice as our own. I studied the subject very carefully, and I came to the conclusion that Judge Wallace was right—with a qualification, and the qualification was this: The French system was adapted to doing justice between people who had French ideas and did their business in the French manner, and an American would have very little chance under it. On the other hand, the American system is adapted to doing justice as between people who have American ideas, and who do their business in an American way, and a Frenchman would have very little chance under it. Well, you find that difficulty everywhere in the international affairs, and in no other class of people in the world can you find it more inveterate than among lawyers. We passed hours and hours and days in that committee in discussing subjects where the only difference was not in our discussion or in what we were saying, but in a different set of ideas in the backs of our heads, and it requires experience to understand that there is such a difference of ideas. Lord Phillimore and myself, the two representatives of the common law system countries, found ourselves up against a granite wall very often, and I suppose that the continental lawyers found themselves in the same attitude as to Lord Phillimore and myself. It required long and patient effort to find out what we were talking about. Now, we agreed that in order that justice should be done in the international court, there ought to be some one man at least in the court who understood the habits, the customs and the reactions of the people a party litigant to any proceeding, and the result was that we provided for such a court—for the present—of eleven judges and four alternates or supplemental

judges, to be elected by the separate and concurrent votes of these two bodies. They are to be judges sworn as judges under the honorable obligation of the judicial office, doing no other business, and they are to sit there and decide international cases according to law.

There were also a great number of ancillary provisions about the court. They are to be paid regular salaries. They are to reside during the sessions of the court at the seat of the court. The seat of the court is to be the Hague. There are provisions for special tribunals upon the request of the parties during vacation. There is a provision for a Chief Judge. Upon application of the parties, the Chief Judge is to designate three judges to take up a case which may be urgent during vacation time. The court will always be ready to do business. At the same time we provided for the continuance of the old Permanent Court of Arbitration at the Hague for the purpose of dealing with questions which involve subjects not altogether justiciable but appropriate for arbitration, so that that old tribunal, which has some of the characteristics of John the Baptist, is not to be destroyed.

I should have mentioned the fact that the election of these judges is to be from a list which is made up by the members of the old Permanent Court of Arbitration at the Hague. The members of that old court from each country are to send to the Secretary General at the Hague two names for each vacancy when this new court is to be put into operation. My friend, Mr. Strauss, whom I see smiling before me, and Judge Gray and Mr. John Bassett Moore and myself will have to get together and propose two names of men whom we think fit to be judges and who, we have ascertained in some way satisfactory to ourselves, will probably be willing to serve as judges, and send them on to the Secretary. All the countries are to do that. And from the list thus made out, these two bodies, the Council and the Assembly, are to make their selections so that you will get the sort of personnel for the Court as far removed as practicable from the ordinary influences of politics for what there is in it.

Of course, the action of the Committee, which was unanimous, does not decide anything. The Committee simply reports to the Council of the League of Nations, by which it was constituted, and the Council now has this plan before it. I don't know what they are going to do with it. In some form or other it will be laid before the Assembly of the League of Nations, which is to meet next month in Geneva. I don't know what they will do with it. It may be that there will be so much opposition to the obligatory feature of arbitration, that they will strike it out.[1] I don't know. I hope not. But, whatever they do with it, that step is taken. Another step forward has been taken, and it is there by the unanimous agreement of fairly competent representatives of ten different nations situated in different parts of the world, widely differing in their interests and characteristics and size and wealth—by the unanimous agreement of a fairly representative body of men familiar with the subject,—a plan for the formation of a court to deal with international questions upon grounds of public right, just as the Supreme Court of the United States, and the Court of the King's Bench of Great Britain, and the Court of Cassation of France, deal with questions of municipal right. I say a unanimous agreement has been formulated for a plan of such a court. Now, this is a step in advance in the processes of civilization. All the processes of civilization are slow. All advances shock somebody, and an attempt to go too fast, too far at once, almost always ends in failure. "Leg over leg the dog went to Dover." I have often thought in observing the progress of improvement of the law in Washington that every good bill had to have a period of gestation. I remember a bill which did great signal service had been knocking at the door of Congress from year to year for thirteen years. It started with nobody for it, and finally some one opened the door and said, "Why don't you come in?" And that is more so in international affairs. Every step forward has to come in contact with the ingrained habits, preconceptions, involuntary reactions of vast multitudes of people, and they have got to be treated just as a nervous horse is treated. If you go at him too fast, you get into trouble. Now, it is very much so about this judicial business. You have got to go step by step. It is five, nearly six years now since the Constitutional Convention of this state adopted a provision for the reorganization and condensation of state government and what is known as the budget system. A great majority of the Convention had agreed upon it, but it was overwhelmingly defeated at the polls. Yet more than twenty states have adopted it since, and the Governor's Commission appointed by the Governor who at that convention opposed it, has now recommended the same thing. Substantially all the important advances upon the Constitution of 1846, which were made by the Convention of 1867 in this state were adopted afterwards, although their plan was rejected at the time.

Now, this idea of arbitration, this idea of affording a substitute for war by the processes of justice, was laughed at in 1899. It was adopted by the 1899 Conference only because they had to do something to save the Czar's face. The Czar had called the Conference of 1899 for the purpose of agreeing upon disarmament, and Germany and some other countries were unwilling to have the subject discussed, but the Conference was called and they had to do something, and so they considered that they would give the children something to play with, and they got up this arbitration proposal. All the wise people said, "Oh, don't bother about it." Very likely, if our Government hadn't sent the Pious Fund case there for arbitration between the United States and Mexico, and if it hadn't been for the backing of the Government of the United States proceeding upon the universal sentiment of the people of the United States in favor of giving this substitute for war a chance by the attainment of justice through judicial procedure, the court would not have amounted to anything. But, it did; and it was enlarged and improved upon, and it was the adoption of that plan in 1899 which made possible the improvement of the plan by the Conference of 1907. The former Conference provided the basis for the 1907 plan for a Permanent Court of Arbitration, and this in turn was what made it possible for this Committee to agree upon the concrete plan for a Court; and whether this plan be adopted as the Committee agreed upon it, or not,

(1) The obligation feature has been eliminated.

it is a step in the direction upon which hereafter the great progress of civilization towards justice in place of war will go on. (Prolonged applause.)

That is all, I think, I have to say on this court. It is a pleasure to talk to lawyers about it. Perhaps I should speak on one more little thing about the court, and that is—procedure. There isn't much procedure provided for. I didn't think it was advisable to propose to the Committee the adoption of the New York code. There is really very little procedure, but a few little things which we thought were necessary were put into the plan of the court. Where you have a great many countries, all with different procedures, it is necessary to be quite general in your rules, and one result of this is, I am sure, that you will get along so much better in dispensing justice.

I want to add that I had very great pleasure later in the summer, in September, of going back to the Hague after finishing the work of the Committee, and presiding in an arbitral tribunal and rendering the first judgment of the Permanent Court of Arbitration at the Hague in the Peace Palace—practically inaugurating that building; and I wish I could tell Mr. Carnegie about it. It was a controversy in which England and France and Spain and Portugal were concerned over the liability of Portugal in the seizure of properties in possession of the religious orders in Portugal at the time of the revolution in 1910. The arbitration was agreed upon in 1913 before the war, and M. Lardy, the old Swiss Minister at Paris, and M. Lohman, the Dutch jurist, and myself were made the arbitrators. The war suspended the proceedings, but they were revived after the war, and in September, the case was brought to an end by the judgment, so there is actual demonstration that the old Permanent Court of Arbitration at the Hague still lives.

Now, I would be very glad to answer questions.

CONSOLIDATION OF CARRIERS UNDER THE TRANSPORTATION ACT, 1920

Examination of Congressional Policy as Set Forth in Railroad Legislation of 1920 and Power of Interstate Commerce Commission and Railroad Companies Under It.

BY BLEWETT LEE

THE Interstate Commerce Commission is beginning one of the most epoch-making undertakings in the history of American railroads. By paragraph (4) of Section 5 of the Interstate Commerce Act as amended by the Transportation Act, 1920, it is provided as follows:

> (4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

The restrictions imposed are very significant. First competition shall be preserved as fully as possible. Competition must be in existence in order to be preserved. The Commission is not required by the statute to create new competition. Competition need not be wholly preserved, it is to be preserved as fully as possible, bearing in mind the next requirement of the act. Secondly, wherever practicable the existing routes and channels of trade and commerce shall be maintained. The tides of commerce, even the rivers and rills, are to flow unvexed, so far as may be. After these two requirements have been complied with the systems are to be so arranged that the cost of transportation as between competitive systems, as related to the values of the properties, is to be made the same so far as practicable, so that under efficient management there will be substantially the same rate of return upon the value of the respective systems. That they will have to employ uniform rates in the movement of competitive traffic goes without saying, for the Interstate Commerce Act requires publicity of rates and forbids rebates. The requirement of substantially the same rate of return on competitive systems is difficult. The values of the respective railway properties have not yet been fixed by the Commission and are involved in the gravest dispute. But the requirement is only "so far as practicable," and there is no restriction on the size of the systems.

Paragraph (5) of Section 5 is as follows:

> (5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

Here is the hearing due process of law requires, and it is significant that the Governors are to be notified and heard. Evidently the local interests of the peoples of the respective States are considered as involved. The people of the United States are already represented through the Interstate Commerce Commission which is their Commission, composed of officials who are their servants as much as the Governors of the several States are, but by this plan in both ways the people are to have their day in court. The statute calls for one plan. Once adopted by the Commission, it can always be changed, but consolidations must be in harmony with the plan. Two inferences at once

follow. No consolidations can be made at all until the Commission publishes its plan, as otherwise the plan of the Commission might be defeated, and as long as the plan is unchanged consolidation is forbidden except in accordance therewith, this by the statute itself. The only flexibility is in the plan. An immense curb has been placed on consolidations. As shown by paragraph (18) of Section 1, new railroads may still be constructed, acquired, or operated under State laws with the authority of the Commission, and by paragraph (2) of Section 5, stock may be bought and leases made, acquirement or operation not involving the consolidation of carriers into a single system for ownership and operation may be accomplished, by authority of the Commission, but any true consolidation will have to wait for the publication of the Commission's plan. It may have to wait for some time. Luckily paragraph (5) of Section 5 gives the Commission express power to bring the hearings to a close. The plan is to cover the railway properties of the Continental United States. This is not as difficult as it looks for the earnings of the various lines are known, many great systems already exist, and many of the shorter lines offer comparatively little selection.

The plan we will suppose has been adopted and published, the work of consolidation is ready to begin. The statute (paragraph (6) of Section 5) goes on as follows:

> (6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:
>
> (a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission;
>
> (b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

Here is something else to be done. The ascertainment of value may involve a long and bitter controversy. The paragraph quoted speaks of "the value" as if there were but one, and so does the new Section 15a paragraph (6). Section 19a itself calls for hearings of its own. Evidently the time of any future consolidation is in the lap of the Gods. When, however, the Commission sees that the new capitalization is safely within the value it will ultimately find, it might not wait for the ultimate valuation. This would be nothing more than good administration requires.

We will assume that the carriers are stout-hearted and go right on. Sub-paragraph (c) of paragraph (6), Section 5, provides as follows:

> (c) Whenever two or more carriers propose a consolidation under this section, they shall present their application therefor to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated, is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decisions or order of any State authority to the contrary notwithstanding.

Here the Governors of the States have one more chance, possibly, as we have seen, their third one, not to mention the opportunities they enjoy when it is proposed to change the capitalization of a separate carrier under new Section 20a, which conceivably may have given them quite a number of chances more. But this is to be the last hearing on this particular consolidation, at any rate. If the Commission had already authorized additional stock issues on a number of carriers, and familiarized itself with their capitalization and values, this might expedite proceedings later, provided the new capitalization did not exceed the previous totals.

In order to refresh the memories of those who may have forgotten the circumstances under which the above provisions about consolidation were enacted I make the following quotation from the Statement of the Managers on the part of the House in the Conference Committee:[1]

> FEDERAL INCORPORATION
>
> The House bill contained no provision for Federal incorporation of railway carriers. The Senate amendment, in sections 15-20, inclusive, provided for the conversion of State railroad corporations into Federal corporations, and in sections 21-23, inclusive, provided for the incorporation of new Federal railroad corporations, and in section 32 provided for the dissolution of such Federal corporations. These provisions, in connection with the compulsory consolidation provisions in the Senate amendment, were intended to bring about eventual Federal incorporation of all railroad carriers. The conference bill strikes out all of these sections providing for incorporation, reincorporation, and dissolution of Federal railroad corporations.
>
> CONSOLIDATIONS, MERGERS, AND POOLING.
> (Sec. 407 of the conference bill.)
>
> The House bill permitted consolidations, mergers, and pooling of earnings or facilities subject to the approval of the commission, and for the purpose of carrying out any order of the commission approving a consolidation, merger, or pooling declared that the carriers affected by such order should be relieved from the operation of the antitrust and other restrictive or prohibitory laws. The Senate amendment in section 9 declared that it is the policy of the United States to require consolidation of all the railroads of the country into not less than 20 nor more than 35 separate systems, and provided (sec. 10) that the transportation board should prepare a plan for such consolidation. Voluntary consolidations were provided for within the period of seven years after the passage of the act, but at the end of that period the transportation board was given power to compel such consolidations. The Senate receded from the provisions for compulsory consolidation and agreed to the House provisions with respect to pooling, as revised by the conferees. The House agreed to the Senate provisions for voluntary consolidations as revised by the conferees in section 407 of the conference report.

Further on the Managers say: "An order of the Commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary." The inference is that it was intended to adopt the policy of voluntary consolidation, while the policies of Federal incorporation and compulsory consolidation were rejected for the time being. The result leaves this part of the statute as enacted a stump, but it was evidently intended by Congress

1. Report No. 650, House of Representatives, 68th Congress, 2d Session.

fully to authorize voluntary consolidation, and supposed by them that authority sufficient for the purpose had been granted by the act. Otherwise Congress would have taken away, as we have seen, everywhere the power of consolidation previously existing under the laws of the several States, without putting in its place anywhere power of consolidation under the laws of the United States. Except on the theory that power had been granted the carriers to carry out the plan of consolidation which the Interstate Commerce Commission was commanded to make, the preparation of the plan and the whole elaborate machinery for changes of plan, petitions, hearings and orders were futile. No one can doubt that the Congressional idea was that the railroads were to be given a chance voluntarily to carry out the Commission's plan.

To any one familiar with the anti-railroad legislation of the various States it is plain that unless the carriers have now more power to consolidate than they had before the new statute, it will be legally impossible to carry out the Commission's plan. Some States forbid foreign corporations to buy, or lease, or acquire any interest in railroads in such States, or to operate the railroads. Sometimes the laws of adjacent States do not fit each other.[1] Prohibitions of the acquisition of parallel or competing lines are widespread. Some consolidations would be *ultra vires* in the States where they will be necessary. There are constitutional impediments, statutory impediments, common law impediments, in many of the States, which would leave the Commission's plan nothing more than "such stuff as dreams are made of."

Paragraph (8) of Section 5 provides as follows:

> (8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to affect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "anti-trust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

What Congress meant to do by naming the anti-trust laws and "all other restraints or prohibitions by law, State or Federal," was to cover every kind of legal impediment to carrying out the plan of the Commission. What the resulting order of the Commission authorized or required, was to be forbidden no more by law.

Not only must the power to consolidate be implied under a reasonable construction, but there are express grants of power. In paragraph (6) above quoted are the words "It shall be lawful . . . to consolidate . . . under the following conditions." This is creative. If it was not lawful before it shall be lawful now. In subdivision (c) of the same paragraph it is provided, "thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding." This too is a grant of power, for the statute plainly indicates that neither statute law nor common law nor administrative order of any State nor, as Saint Paul said, "any other creature," shall prevail against that "may be effected." The very case is put of the consolidation being unlawful under State law, and it is commanded that the consolidation may be effected anyhow. In order to test this question let us suppose that the States should repeal their statutes authorizing consolidation. This they would almost everywhere have power to do,[1] and railroad companies cannot consolidate without statutory authority.[2] Would the intent of Congress entirely fail? Would the Commission plan be stillborn? Undoubtedly yes, unless the provisions above quoted themselves confer the power of consolidation.

The effect of these provisions is to amend the charter of every carrier subject to the act by conferring a new grant of power—power to consolidate upon certain conditions with other carriers. Such a consolidation would no longer be *ultra vires*. Congress concluded it was not necessary to create Federal corporations, or lift the great axe of eminent domain, in order to secure the consolidations desired, but that it would suffice, for the present at any rate, to give the State corporations power to consolidate, and perhaps make it to their interest to do so, by reaching out for their net railway operating income in excess of six per cent under paragraph (6) of Section 15a. System earnings are there considered as a whole, and unless there is a wise formation of systems, some one's fingers may be burned. Congress certainly never contemplated that after it had adjourned all the carriers would have to run to their mother States and ask there if they might do as Congress bid. But has Congress power to amend State charters of railroad companies in this way?

The powers of Congress under which legislation of this kind, consolidating carriers, and so simplifying, cheapening, and improving transportation, might be sustained are three, the war power, the post roads power, and the commerce power.[3] This statute was passed while we are technically at war. It must not however be supposed that there is no war power during peace. In time of peace it is necessary to prepare for war, as we learn to our dreadful cost, in each generation. In the recent war it was considered necessary for the government to seize and operate all the railroads of the country under the war power. As a preparation for war, the carriers may be so consolidated as to perform the function of transportation better, or to be more easily taken over again by the government when necessary. It is legitimate for war purposes to simplify railroad operating conditions and to break up artificial obstacles to the movement of cars. The Southern Pacific, for example, one company, handles freight all the way from New York to San Francisco. Such an advantage is worth bringing about by consolidation if necessary.

Under its power to establish post roads Congress may enter the limits of the States and build its own roads everywhere just as it built the National Highway; or it may use the roads, or railroads already there. If the carriage of the mails would be facilitated by consolidating the properties of the carriers, diminishing the number of transfers

1. Railway Consolidations on the Indiana-Illinois Line by E. Parmalee Prentice. 12 Harvard Law Review 486 (1899).

1. Pearsall v. Great Northern R. Co., 161 U. S. 672 (1896).
2. American Loan &c. Co. v. Minn. &c. R. Co., 157 Ill. 641 (1895). Noyes, Inter-Corp. Rel. §§ 17, 24 (2d Ed. A. D. 1909).
3. California v. Central Pac. R. R. Co., 127 U. S. 1, 39 (1887).

of the mails or mail cars, or the expense of carrying the mails, and reducing the difficulties of the Post Office department by diminishing the number of carriers necessary, that also is legitimate.

The power of the Federal government over post roads has been allowed to remain almost dormant, but still it is there, and has tremendous scope. A former President of the American Bar Association, and a great lawyer, Edgar H. Farrar, prepared an elaborate paper September 9, 1907, upon the Post Road power in the Federal Government and its availability for creating a system of Federal Transportation Corporations and presented it to President Roosevelt, besides sending it to the members of the Association. Those who have been wise enough to preserve it will do well to read it again, and apply the reasoning to the matter in hand. Mr. Farrar really leaves nothing more to be said. Among other authorities, he relies upon McCulloch v. Maryland,[1] Osborn v. U. S. Bank,[2] Farmers Bank v. Dearing,[3] Kohl v. U. S.,[4] Cherokee Nation v. Kansas Ry. Co.,[5] Monongahela Navigation Co. v. U. S.[6] and especially upon the post-road power, Dickey v. Turnpike Co.[7] and Ex parte Rapier.[8] I cannot forbear to quote his concluding words, for they are almost prophetic.

> Great abuses have arisen in the issuance and manipulation of the stocks and bonds of these great transportation companies. Other great abuses have arisen in the treatment of the public by these companies; and other abuses equally great have arisen in the treatment of these companies by the public.
>
> The American people want all these abuses stopped, and by some means short of Government ownership, which some of them favor, but which most of them justly repel. I believe, and I think most of them believe, that the united strength of the whole nation is alone competent to effect the desired results, and therefore that any plan that can be devised, consistent with the Constitution of our country as interpreted by its lawful expounders, which will bring all transportation by land and water under the strong arm and the vigilant eye of the Federal Government, is a "consummation devoutly to be wished."

The chief reliance however of the supporters of this law is naturally placed, on account of the greater abundance of decided cases, on the commerce power. Naturally there are no cases exactly in point, for never before has the power of Congress to provide for the consolidation of carriers of interstate commerce been put into execution. It has been dormant since the Government began. The lion has only now come out of his den. But the principles involved are well established. There, as Webster might have said (for he was there) is *McCulloch* v. *Maryland*,[9] and there it will remain forever. In the opinion of the Master-builder of the Federal state we find these words:[10]

> Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies.

Incorporating railroads lies much nearer to regu- halted by the incorporation of carriers.[11]
corporating a bank. The kingly march of reason of the great Chief Justice would never have been halted by the incorporation of carriers.[8]

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Indeed there can be no doubt at all that Congress might have chartered the carriers entirely.[1]

We might suppose that the whole includes the part, and that if Congress can confer a whole charter it can confer part of one, but some of the judges have not always seen the whole way. We stand on their shoulders. Frequently an opinion is written by one judge which other judges would never have written that way, but which they would not feel quite justified in making war upon. In Louisville & Nashville R. R. Co. v. Kentucky[2] it is said in an opinion by Mr. Justice Brown,

> If it be assumed that the States have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of State legislation—a proposition which only needs to be stated to demonstrate its unsoundness.

This language was entirely unnecessary to the decision of the case, and the present Chief Justice and Mr. Justice Brewer simply concurred in the result. In that case Congress had not acted. Now the question is no longer moot, Congress has undertaken to do the very thing, and something more than the statement of the proposition will be required to demonstrate its unsoundness. A great deal of water has gone over the dam since 1896. In the Northern Securities Case[3] this decision was pressed upon the court by Mr. Bunn as showing that the right to forbid consolidation of competing carriers was reserved to the States. But the court held that Congress could forbid consolidation. If so, cannot Congress authorize it?

To begin with, nothing turns on the fact that a State has previously incorporated the corporation. Congress may indeed incorporate directly as in case of the Texas and Pacific and Union Pacific Railroad Companies.[4] But Congress is not bound to do so. It may take a company already incorporated and confer upon it new and additional powers, and the originally incorporating State cannot even tax the franchise so conferred.[5] This was the case of the Central Pacific Railroad Company in the case just cited. All the judges agreed, and the opinion was by one whose mind was like a rapier, Mr. Justice Bradley. Is the State power to forbid consolidations any more sacred than the State power of taxation sought to be exercised over the Federal franchises?

In view of the attitude which some State public utility Commissioners have already shown toward the new rate-making powers given by the Transportation Act, 1920, to the Interstate Commerce Commission, one is led to wonder how long it would take to get the railroads of the country consolidated if Congress had to depend upon State laws to get it done. (It is not intended to criticize these Commissioners.)

The most conspicuous instance of Congress turning State corporations into Federal ones is of course under the National Banking Law, where the

1. 4 Wheat. 316. 2. 9 Wheat. 738. 3. 91 U. S. 29. 4. 91 U. S. 367. 5. 135 U. S. 641. 6. 148 U. S. 312. 7. 7 Dana (Ky.) 113. 8. 143 U. S. 134.
9. 4 Wheat. 316 (1819). 10. P. 407. 11. P. 421.

1. Luxton v. North River Bridge Co., 153 U. S. 525 (1893). Pacific Railroad Removal Cases 115 U. S. 1, 16 (1885). California v. Central Pacific, 127 U. S. 1, 39-40 (1887). U. S. v. Stanford, 161 U. S. 412 (1895).
2. 161 U. S. 677, 702. (1896).
3. 193 U. S. 197, 274 (1904).
4. Pacific Railroad Removal Cases, 115 U. S. 1, 16 (1885).
5. California v. Pacific Railroad Co., 127 U. S. 1, 35-39.

process has gone on wholesale. In *Casey* v. *Galli*[1] a state bank had become a national one. In a stockholders' liability suit by the receiver, Galli pleaded among other things that the State law did not authorize such a change of organization and that

> the owners of two-thirds of the capital stock of the Bank of New Orleans did not authorize the bank to be converted into a national banking association under the laws of the United States, nor to accept an organization certificate as such banking association.

But the court said:

> No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. 13 Stat. 112. The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally.

The interesting thing is that the transformation can be made against the will of a minority stockholder. As Mr. C. W. Bunn has pointed out, if it can be made effective against the will of one, it can constitutionally be made effective without the consent of any.[2] When a man invests his money in a common carrier for the public service, he takes his chances of regulation.[3] Congress may feed State railroad companies with charters either *table d'hote* or *a la carte*. It is certainly wise to hold that Congress is not bound to go any further than it likes, in dealing with State charters, unless we are prepared for Federal incorporation full and complete.

An interesting question arises as to how far the restrictions of State constitutions and laws upon parallel or competing lines consolidating will interfere with the Commission's plan. Although there is very little authority on the point, this prohibition has been construed to mean railroads which are parallel or competing within the prohibiting State.[4] Paragraph (8) of Section 5 above quoted seems to leave no doubt that in the event the consolidation authorized or required by the Commission's order made it necessary for the carrier to be relieved from the operation of the prohibition of consolidation of parallel or competing lines, the prohibition would cease to be effective, for it falls in the same class as anti-trust laws, even upon the narrowest interpretation of the paragraph.[5] It is made, however, the first duty of the Commission under paragraph (4) above quoted that competition shall be preserved as fully as possible, so that there is no occasion for alarm.

Another interesting case arises where the policy of States has changed, and consolidations permissible under statutory charters as originally granted would now conflict with hostile legislation since enacted, forbidding consolidation. If paragraph (8) is to have the broad construction necessary to effectuate the Congressional intent, the original charter powers to consolidate would no longer be impeded by later restraints and prohibitions conflicting with them, and which would interfere with what is necessary to enable the carrier to carry out the Commission's order. The powers of consolidation originally conferred by the State not unrepealed would be to that extent restored.[1]

Does consolidation include a purchase by one company of the properties of another? There is good authority for answering this question affirmatively.[2] Such an interpretation would facilitate greatly carrying out the national plan. It is to be noted that the statute speaks of consolidation of properties. Consolidation of corporations is only one of the ways of consolidating properties. The provisions of Section 5 paragraph (6) subdivision (b) as to "the bonds at par of the corporation which is to become the owner of the consolidated properties" would apply to one carrier purchasing the railroad of another. But there is a real difficulty here. If there is no consolidation of the corporations themselves, where will the buying company get the power to own and operate the purchased line, to exercise the power of eminent domain and the like? It must be got from the laws of the States where the purchased line is situated. It is not given by the Federal statute unless by implication so doubtful that no carrier ought to risk it. The statute certainly needs amendment here.

Is it necessary to follow the laws relating to consolidation in the several States? Where there are any, no cautious lawyer would think of doing otherwise, in order to diminish the risk of attack, but where for any reason there are no suitable provisions, there still remain the ordinary common law powers of corporations by which they act. Under its power to "prescribe terms and conditions" of consolidation granted in Section 5, paragraph (6) subdivision (c) the Commission would have power by general order to deal with the situation. In so fundamental a matter, undoubtedly favorable action by a majority of the directors and of the stockholders of the company would be necessary. The theory of the statute is that the consolidation is to be voluntary,—it is to take place "if all the carriers involved consent thereto", but the statute does not provide that all the stockholders of all the carriers involved must consent thereto, and to impose such a requirement would be to make consolidation impossible, and defeat the intent of Congress altogether. It would unquestionably be advantageous if the statute were amended so as to cover the details of the necessary corporate action.

The question may also arise whether or not State statutes imposing heavy incorporation fees upon the consolidation of carriers of interstate commerce will be applicable.[3] Section 5 makes no exception in favor of such fees.

The attention of the cautious is particularly called to paragraphs (2) and (3) of Section 5, as follows:

> (2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by purchase of stock or in any other

1. 94 U. S. 673, 678 (1876).
2. Federal Incorporation of Railroad Companies, 30 Harvard Law Review 589. 594 (April, 1917).
3. Mr. Bunn cites L. & N. R. R. Co. v. Mottley, 219 U. S. 467, 482 (1911).
4. Kimball v. A. T. & S. F. R. Co., 46 Fed. 888, 890 (1891). It can hardly be supposed that a State constitutional convention intended in any way to control the policies of other States as to railroads
5. For a recent discussion of the rule of *ejusdem generis*, see S. S. Magnhild v. McIntyre Bros. & Co. (1920), 3 K. B. 321. It seems to us that other parts of the statute control the interpretation. The word "whatsoever" would be helpful in paragraph (8) of Section 5.

1. U. S. v. Philbrick, 120 U. S. 52 (1887); 36 Cyc. 1099.
2. See Branch v. Jesup, 106 U. S. 468, 478; Hill v. Nesbit, 100 Ind. 341; Ryan v. R. R. Co., 21 Kan. 365; Wehrhane v. R. R. Co., 4 N. Y. St. Rep. 541; Marbury v. Ky. Union Land Co., 62 Fed. 335, 344; Chicago S.-F. & C. Ry. Co. v. Ashling, 160 Ill. 373, 380.
3. See W. U. Tel. Co. v. Kansas 216 U. S. 1; Pullman Co. v. Kansas. *Ibid.* 56; U. P. R. R. Co. v. Pub. Serv. Com., 248 U. S. 67.

manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

(3) The Commission may, from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

Paragraph (8) of Section 5 removing restrictions of State laws, applies also to paragraph (2). Action under (2) does not have to wait for a national plan or for a valuation. If the result is to put the group of carriers under common control and management and operate them as a single system, they will be regarded as a whole in the ascertainment of net profits under paragraph (6) of new Section 15a. Carriers would therefore do well to act under paragraph (2) instead of paragraph (6) of Section 5 until the legal situation has developed further.[1] This is particularly true if it is proposed to issue new securities.

While the opinion has been expressed that as the statute stands it is sufficient for the purposes of voluntary consolidation, it is not sufficient to prevent doubts, especially in so horribly delicate a matter as railroad finance, where the attorneys of purchasers of securities habitually advise their clients not to take any risk at all. Why should they when there are so many excellent investments that there is no doubt about? An amendment to the statute providing complete machinery for consolidation and expressly giving the consolidated company power to own and operate, to exercise eminent domain, to issue new securities, in short going farther toward Federal incorporation, by amending still further the State charters of the carriers, would do no harm and would remove doubts on this subject, which otherwise may prevent the negotiation of securities of the consolidated companies. After immense labor, the Transportation Act, 1920 still had to run a race against time, and its framers were not in position to perfect every detail.

No attempt has been made to discuss the matter of compulsory consolidation, which raises a set of constitutional questions all its own. It may be that Congress will conclude to let voluntary consolidation be tried out first, before proceeding to sterner measures. All the more reason then to smooth from the way of voluntary consolidation every possible objection.

32 Nassau St., New York,
December 1, 1920.

1. Attention is called to paragraph (18) of Section 1 of the Interstate Commerce Act as amended, which seems to refer, however, to the creation of new transportation, the converse of its abandonment, and grants no new powers.

PENNSYLVANIA'S STATE CONSTABULARY*

WE in Pennsylvania feel very proud of our State Police. It is an organization such as no other State has although I understand there is an agitation for the creation of such a body in New York. As an organization for the protection of property and preservation of peace I think it has not a counterpart in the world, although the Mounted Police of Canada, which I think inspired the organization, somewhat approaches it.

Its members are selected by the superintendent, after competition and medical examinations, from voluntary enlistment.

It is organized and trained like a military company and is not dominated by politics. Few men are ever discharged for inefficiency or violation of discipline. The men are promoted in rank.

I think the first organization started with three, but now there are five troops of eighty-three officers and men. Each troop is equipped with fifty horses and fourteen motorcycles. The remainder of the men operate on horseback or in civilian clothes. The horse always goes with his rider. The troops are officered by captains, lieutenants, sergeants and corporals. Each troop has headquarters consisting of one barrack, stable, blacksmith shop and garage. These headquarters are apportioned geographically throughout the State, and each troop covers a number of counties, with the aid of from three to eight substations.

The administrative part of the organization is under the head of a superintendent and deputy superintendent, with offices at Harrisburg, the capital.

When any disturbance occurs in any part of the State which the local authorities think they are unable to cope with, they ask for such number of the State Police as they think necessary. The result has been that in every instance in which the State Police have been called on they have made good. They are a body of exceptionally brave men.

Some years ago there was a strike and a very bitter strike at Bethlehem, in the Bethlehem steel works, the home of the Bethlehem Steel Company. The local authorities—the sheriff and his *posse comitatus*—were entirely unable to cope with the situation. One or two people had been killed. They asked for a detachment of the State Police, and a company or perhaps less was sent there, and within twenty-four hours order was restored and the strike broken.

I do not think the militia have been called out in Pennsylvania since the organization of the State Police. The State Police are more efficient than the national guard and more economical. Experience has shown that fifteen or twenty State Police can do the work of a whole company of the militia.

They are efficient in either detective work or patrol duty. Their activities are as wide as the scope of law-breaking. They can be called on to look after any offense, no matter of what nature it may be. They are not only brave but discreet and tactful as well. A large part of their efficiency is due to their training, out of which grow discretion and good judgment.

Periodically they have a school, conducted by the superintendent or a deputy superintendent, and are instructed as to the rights of citizens, their limitations in making arrests, the ordinary ways of detecting criminals, and in all other matters pertaining to their official duties. I have never known a State Policeman to be criticized for making an unlawful arrest.

They are trained at the headquarters. They are pretty busy men. When you consider we have ten thousand miles of improved or semi-improved state roads, this is not hard to understand.

*From address by Judge William G. Hargest to Association of Attorneys General at St. Louis.

FORCES THAT AID CRIME IN GREAT CITIES

How the "Good Citizen," Official Corruption, Racial and Religious Prejudices and Organized Criminals Combine to Make Law Enforcement Difficult

By Maclay Hoyne

ON his recent retirement from the important position of State's Attorney for Cook County, Illinois, Mr. Maclay Hoyne wrote a letter to his successor summing up his experience in fighting crime in Chicago for the last eight years. Rarely, if ever, has there been gathered within so brief a compass such a complete and striking summary of the difficulties which an able and honest official encounters in the effort to enforce the law in a great American city. These range all the way from the indifference of "good citizenship" and the positive alliance of crime with certain police officials, which the history of American cities has made too familiar, down to the woefully inadequate provision for maintaining a corps of prosecutors charged with such vital functions.

Mr. Hoyne, at the request of the Journal, has amplified this letter with some further observations drawn from his official experience. Of particular interest is his revelation of the obstacles which the solidarity of different racial and religious groups presents to the administration of Justice in cities which, like Chicago, have a large foreign-born element. The statement follows:

UNDER existing laws and conditions the prosecutor's chief trouble is the lack of moral support and proper civic patriotism of a very considerable part of our community, and I do not refer to the criminal or vicious element. Many of our best citizens will evade jury service upon any possible pretext, and as has been seen in many important trials, will even resort to perjury to disqualify themselves. They do not sympathize with the prosecutor but with the criminal. There have been flagrant miscarriages of justice in important trials, even those involving murder, for which the juries alone may be blamed. This element in the community views with amusement and sometimes applause the acquittal of habitual criminals through the fixing of jurors, perjury, the subornation of perjury, and the crooked tricks of crooked attorneys.

I would be willing to submit to the Bar of this County my reputation as a prosecutor and as a lawyer, in view of the work done, the untiring efforts made, and the obstacles involved upon some of the cases lost instead of the cases won, including many of those which were spectacular. To illustrate: the cases of a chief of police, an indicted alderman, a political crook, a plain murderer, a well known man indicted for arson, a gangster killer, a wife slayer, an anti-trust conspiracy case, and many others. In all of these cases except one money, influence or influential connections overcame all of the efforts of the State.

Citizens in the possession of evidence conceal it rather than lose some of their time in a court room.

The Parole system in this state, as I demonstrated by figures I compiled, turns out convicts faster than the prosecutors can put them in the penitentiary. The Parole Law has been viciously administered. It is unnecessary with the Probation Law in existence, and with humane Criminal Court Judges and a humane State's Attorney who will show mercy to the first offender. I still believe it should be repealed.

The State's Attorney should have the active support and co-operation of the police department. Police officers who change, or falter in their testimony, or display sympathy with the defense in criminal cases should be summarily discharged. The crooked detectives and police who protect criminals and share in their illicit gains should be driven from the department.

Corruption and Crime

Corrupt public officials and employes, corrupt attorneys, doctors, bondsmen and newspaper men are a constant menace to the administration of justice. There are corrupt men in all professions and lines of business. They should be driven from the courts and from their employment.

The Ward and Precinct politicians who thrive upon crime, vice and criminal graft, must be continually pursued. The courts should not be permitted to escape their share of blame. Political, cowardly, inexperienced and incompetent Judges in the past have permitted criminal trials to be turned into a mockery and their court rooms into a circus, so that juries have been justified in believing that they were attending a farce comedy rather than a trial in the court of law. In violation of the rules of evidence, decency and dignity, attorneys for defendants have been allowed to run riot, intimidate state witnesses and the police, and attempt to destroy the character of the public prosecutor and his trial Assistants.

Attorneys for the defense should not be permitted unrebuked and without subsequently being held to account, to present the so-called "third degree" defense, when based upon palpable perjury, merely because their clients are wholly without any honest defense.

The most recent and one of the most shameful examples of this sort of conduct occurred in the case of People vs. James Vinci, where three Assistant's State's Attorneys with unsmirched records were charged with brutality and conduct which should have brought about their disbarment if the charges were true. A hundred like illustrations might be made.

During my eight years in office, in every case these charges were brought by criminals or men indicted for crime, and usually by habitual criminals. When such false charges are fathered by newspapers or respectable attorneys or citizens the tendency must be to break down law enforcement and bring the law into disrepute.

I have yet to hear of a reputable citizen who has complained that he has been beaten, abused or

subjected to the third degree in my office by my Assistants or employes, or the police assigned to my office.

Decent public sentiment, the Courts, the Bar and the press should put an end to these abuses and the particular abuse to which I have last referred.

Prejudicial Journalistic Methods

During my administration at times the attitude of one or more newspapers in handling their news columns has been not only a detriment to but amounted to an obstruction of justice. Prior to the trial of important criminal cases newspapers have printed columns containing charges by the defendants or their attorneys or friends to the effect that the State's Attorney was actuated in the prosecution by personal hatred or prejudice, or sought personal or political advantage by such prosecution, and that the State witnesses were being influenced by lavish entertainment in hotels, including sumptuous banquets and liquor, tobacco and amusement, ad libitum.

What must be the effect of such charges, if believed, upon the minds of readers who are summoned and may subsequently serve as jurors either in that particular case or other cases. It tends to discredit the prosecutor and the prosecution of crime.

Recently Jack O'Brien was executed for murder, and the newspaper reporters obtained interviews in the jail with prisoners indicted for other murders, to the effect that O'Brien was innocent and that the murder in question was committed by one Sonny Dunn. This was repeated so frequently that there are today many people in Chicago who believe that O'Brien was an innocent victim. This was the most damnable lie ever given circulation in the history of criminal law in Cook County. Immediately after the murder by O'Brien, Dunn was apprehended, searched, and had no weapon. No witness was ever produced who said Dunn was guilty, and there was not and is not now a scintilla of evidence against him for that particular crime.

The defense of newspaper men for articles of this character, as I understand it, is that the press seeks to give a square deal to every one and a hearing to both sides, if it is desired. Let us admit this is admirable as a general, or if you please, an almost universal rule. But why should the word of a man accused of crime be given equal weight with a man elected by the people to, and sworn to, enforce the law and prosecute criminals. I do not know of another city as large as Chicago in which such a custom prevails.

Our present laws are so framed that not only is there no chance of an innocent man being found guilty, but there is an even chance that the guilty man may escape.

From my acquaintance with prosecuting offices in the large cities in this and other states, it appears that the prosecutor who can convict from 45 to 50 per cent of those tried has made better than an average record.

A professor of one of the leading law schools connected with an Eastern university recently said that under existing laws it was a surprise to him that there were ever any convictions unless the defendant plead guilty. I have not the figures before me, but I believe the record of my office for the past eight years will show a record of about 60 per cent in convictions. During the three months drive on crime when we had eleven or twelve Judges sitting in the Criminal Court for about ninety days, and when public sentiment and the press were thoroughly aroused, this record ran much higher. As I recall, in that period of crime juries brought in the death penalty in fourteen or fifteen cases. There is no parallel to this in the history of criminal prosecution in the United States or England during the past hundred years so far as I know. I cite this to show what can be accomplished when the Courts, the juries and the prosecutors are supported by an aroused public conscience and sentiment, backed by a united press.

Why Justice Fails

At the present time the administration of justice and the public prosecutor suffer chiefly because of these reasons:

The people are without the right of appeal.

There is no change of venue by the people.

The verdict of a jury must be unanimous.

The absence of power by the State's Attorney to detain, hold, sequester or confine witnesses in murder and other principal felony cases. A perfect and recent illustration of this is the case of the Enright murder, in which a complete and almost faultless case against all of the defendants was wrecked by the release of all the important witnesses of the State, with one exception, on writs of habeas corpus, after which they were spirited away and disappeared. The one exception, James Vinci, who, unlike the other witnesses who had made complete statements, could be thrown in jail when he repudiated his confession because he was under indictment for complicity in the murder. The other witnesses were not indicted and could not have been upon their own statements, or any other evidence in the possession of the State. No defendant except Vinci had made a statement.

The abuse of the writ of habeas corpus, especially in permitting attorneys who are not employed or even known to the person detained to bring petitions for such writs at the instance of a criminal who fears the testimony of the person first mentioned.

The absence of power by the State's Attorney, or any assistant or employe, to make arrests except through the sheriff or chief of police.

The denial of the right by the present rules of the Criminal Court to the State's Attorney to prepare his own calendars,—a right never denied until my election, and which prevails in almost every other jurisdiction of which I know.

The failure of the law to make bonds given in criminal cases a lien upon the property scheduled.

The vicious practice of granting bonds in criminal cases pending in the Municipal Courts outside of court and in the night time, or on holidays when the sureties cannot possibly be investigated. Recovery is seldom had on a bond given in the Municipal Court because it is worthless. No bond should be accepted until the Clerk of a Court, the State's Attorney or some other official has had the opportunity to and has investigated the sureties and the property scheduled.

The Indeterminate Sentence Law.

The Parole Law and its improper administration.

Strictness in the rules of evidence as against the State.

The failure of the police department, immediately after the commission of a murder or other serious crime, to notify the State's Attorney's office so that an Assistant may immediately be on the ground, interrogate witnesses, and take charge of the preparation of the case. Policemen, however efficient and experienced, are not lawyers. At my request an order to this effect was issued by a former Chief of Police, but for a long time it has been ignored. Important criminal cases are won by immediate investigation and prompt preparation before the case is tried in court. One Assistant who conscientiously and properly prepares his case is worth five who merely "try" it.

Outside of the objections enumerated, most of which can only be cured by legislation by the General Assembly, and some by Constitutional amendment, there are numerous others which might be mentioned, some of which I have previously referred to.

Such cities as Chicago, St. Louis, New York, Cincinnati, Milwaukee, and others that might be mentioned, have to deal with crime problems which are complicated by the fact that a large proportion of their inhabitants are foreign born, or descendents of the foreign born, and are inclined to adhere to the beliefs, traditions, customs and prejudices of the fatherland from which they came. Chicago is essentially a city of the foreign born.

Racial and Religious Obstacles

Thus one bane of the public prosecutor in Chicago is race sympathy and prejudice and religious sympathy and prejudice. If a man of some foreign nationality is accused of crime, the prosecutor is sure to receive delegations of the defendant's fellow countrymen, who ask for immunity or leniency practically upon the sole ground that he is a fellow countryman, and there is the implied promise or threat that the action of the prosecutor on their request will determine the future course with reference to elections of the entire particular nationality in question.

In the same manner religion is employed, and priests, ministers and rabbis will urge that the offense of a criminal be overlooked because he and his family are identified with their particular church, and his conviction would be a reflection upon the entire sect.

I recall that the officer of a charitable organization asked me to recommend to a Judge of the Criminal Court that he commute the death penalty to life imprisonment upon the sole ground that no one professing the particular religion which the convicted man followed had ever been hung in Cook County and it was desired to keep the record clean. I declined.

I would enumerate as the next difficulty of the prosecutor the reluctance of juries to convict women of crime. This disease, while it may be of general prevalence, is particularly virulent in Cook County. During my eight years as prosecutor husband murder has gone unpunished. Even in one case where the wife shot her husband three times in the back while he was asleep there was an acquittal.

Nor is indulgence shown to murderesses of husbands alone. I now recall the conviction of only three women for murder or manslaughter, and the maximum penalty of course was not imposed. In one case the woman was assisted in the murder by her husband; in the second case the woman was colored and not young, and the third case the woman was 60 years old.

Power of Criminal Organizations

It is organized crime, not crime committed on impulse, that gives the prosecutor his big problem in the large cities. Its ramifications extend into the police department and sometimes into the office of the sheriff, clerk of the Criminal Court, and even reach the Bench or the prosecutor's office. Such an organization has its own attorneys and bondsmen, and its tentacles reach into other cities and other states. To obtain the conviction of a member of such an organization, these ramifications must be understood, and there must be untiring and continuous work and eternal vigilence.

Safe-blowers, confidence men, pickpockets, bank robbers, and sometimes highway robbers will be found to have organized backing. To this class should be added those who make a business of stealing automobiles, jewelry, furs and committing arson for insurance.

A few illustrations of the methods used to protect confidence men are illuminating. One of them, "Doc," had operated before coming to Chicago in San Francisco, and was badly wanted by the police and a reward offered for his apprehension. He was finally located in Ottawa, Illinois, and the California sheriff was about to take him west when one of the detective sergeants on the clairvoyant detail, who had been apprised of his plight, swore out a warrant in the Municipal Court of Chicago charging the "Doctor" with confidence game, and rushed to Ottawa with his warrant. The sheriff interposed objections, being desirous of obtaining the California reward, but when one of the Chicago detective sergeants insisted on the preference which should be shown the Illinois complaint, and offered to pay the reward himself, the "Doctor" was turned over to him and they left for Chicago. The prisoner was immediately turned loose and the detective sergeant rushed to the Municipal Court and dismissed the complaint.

The same method was employed in New York City to save "Frank," the best known of the Chicago clairvoyants, who operated under the name of "Prof. Ross." He was under indictment in Boston, where he had used the alias of "Prof. Redfern." The police attached to the District Attorney's office in New York City learned that the District Attorney had been asked to locate "Frank" and hold him for extradition to Massachusetts. The police officer in question hunted up a victim of "Frank" who lived in Long Island, and promised that if he would make a complaint in New York City against "Frank," he would get back at least half of the money he had lost. "Frank" was arrested on the New York complaint, gave bonds which he jumped, and was next heard of in Chicago. The Boston authorities also wrote the head of the Detective Bureau in Chicago, saying that "Frank," alias Redfern, was wanted in Boston and sent his picture. The head of the Detective Bureau in Chicago, at the dictation of a politico-crime potentate, replied that no such person has ever been in Chicago, al-

though at that particular time "Frank" was in Chicago and was operating under the alias of "Prof. Ross."

Barriers to Extradition

The prosecutor frequently finds barriers to the extradition of well known criminals. This I learned my first year in the office. Two men were indicted for arson and burning to defraud. They sought refuge in one of the large cities of the country which is in a Western state. I met with opposition from the local police and State administration, and the Governor as well, even though they were actually located and arrested. To this day they have never been compelled to face trial.

It is perfectly well known that certain cities are sanctuaries so far as criminals are concerned. One particular city is notorious in this respect. In this city the criminal who has committed an offense in another state, no matter how bad, and has a previous record, is perfectly safe to enjoy the gains of his crime so long as he refrains from a commission of crime while in the city. It took me some years, through newspaper and political influence, to make the connections necessary to procure the arrest and extradition of criminals wanted in Cook County who had sought retirement in this haven.

There is nothing local about the organization of corrupt police. They have their alliances and allies in other large cities in the country. I found in fighting crime that the powerful "fixer" in Chicago was equally potent in Kansas City, Louisville, and numerous other cities. I followed one criminal for four months and he was finally located in Buffalo and arrested. On a hearing of a writ of habeas Corpus it developed that at some point between leaving the station and appearing in Court, the police had substituted another individual who resembled the man originally apprehended, but who of course was wholly innocent. Of course it was insisted that the man who appeared in Court was the man originally arrested.

Police Department Cooperation

I wish to emphasize that a completely successful administration of the difficult office to which you have just been elected requires, in my opinion, the support and cooperation of the elements and forces to which I have adverted, and the removal of all or some of the enumerated difficulties a prosecutor faces, but especially is it essential that the police department, and that particular branch, the detective bureau, be honest, earnest and aggressive in your support. So long as many commanding officers in the police department are chosen from its criminal element, as has been and now is the case (and I make no reference to the present Chief of Police or former Chiefs of Police Schuettler, Le Roy Steward and Alcock, the latter now being First Deputy), you will get no such support.

Immediately upon my election in 1912 this element in the community thought the good old days would not only continue but become better, because I had been nominated by the faction of my party controlled by the then Mayor of Chicago. It was believed that I would not attack any branch of the police because inferentially it might reflect upon my friend and sponsor, the Mayor.

The Detective Bureau, (the heads of which had the confidence of the Mayor) and their fellow criminals outdid themselves in a riot of graft, robbery and stealing. They sought to foist upon me a police detail made up of their fellow crooks and cronies, and, failing in this, not only sneered at me behind my back, but openly ridiculed and defied me. The resulting prosecutions and convictions in which I was supported by the Mayor are now a matter of history.

You too were nominated by the faction of your party led by the present Mayor of Chicago, and your election has no doubt been the occasion of rejoicing by the same element in the police department to which I have referred. May I, therefore, as a kindly warning, refer what I have just said above to you for careful consideration?

The Cost of Office

The office of State's Attorney has and will cost any incumbent much, unless he be dishonest and utterly callous, however courageous and staunch he may be, in ideals and beliefs destroyed or shattered.

He must pay in health, in broken friendships and severed political relationships.

He must suffer from ingratitude, perhaps as keenly as did Julius Caesar and King Lear, and from the realization that the dictionary definition of the word "friendship" was not accepted by some to whom he has looked or turned for aid or guidance.

He will doubt whether there could possibly exist a David and Johnathan, a Damon and Pythias, a Fidus Achates, or an Horatio.

He may come to the conclusion that mankind is better typified by Judas, Macbeth, Iago or Benedict Arnold.

He must endure calumny and the misunderstanding and misconstruction of his best motives by the sincere and well meaning.

He must learn, if he does not already know, that a large portion of the community regard all politicians as corrupt, and all office holders as thieves, who seek to hold office solely to plunder the public funds and blackmail or levy tribute upon the criminal, weak and unfortunate, for their own enrichment.

He faces the ever present danger of loss of life or bodily injury from criminals or cranks which threatens his family and himself.

He and his family must constantly bear the annoyance of anonymous letters and telephone calls, with all their false charges, fabrications and threats, couched in the most scurrilous, indecent, blasphemous and profane terms.

He must accept the loss of privacy in his family life and relations and business affairs.

While much of what has just been said applies to any public officer, I do not think it does so to the same degree.

Attempts to Exert "Influence"

My own experience confirms all that has been said. Men in whom I have believed have urged me either not to initiate or to terminate prosecutions against persons of influence, prominence and wealth, even when they must have known that my compliance meant the ruin of my reputation. I have accorded private interviews to men I have known for years, only to discover, to my surprise, that their object was to swerve me from the path of plain public duty by bribery, direct or indirect.

Attorneys and others having a "friendly inter-

est" in my welfare have shown me easy methods for "shaking down" vulnerable wealthy corporations and individuals and been anxious and ready to assist for a "reasonable" share of the resulting gains.

Persons who were also "kindly disposed" have pointed out many other ways of making easy money out of the office.

Others have sought to explain what kind of graft is legitimate and how to get it.

Again and again lawyers of prominence, some of them politicians, but all of them with influence, have approached me for the sole purpose of preventing indictments, or obtaining bonds or continuances, although they never intended to conduct the defense of the persons involved in such cases, and actually never did.

Lawyers of the same type have requested me to nolle cases, to consent to new trials after convictions, or confess error upon appeal, in cases in which they had never previously appeared and with which they afterwards had nothing to do.

My refusal of such requests has frequently aroused the enmity and political opposition of those soliciting these "favors," or abuse and charges of ingratitude by them, although previously they had professed their friendship.

Yet I have found out my true friends and made some few new ones. I have learned who were my most bitter enemies and to know them. I know human nature in its strength and weakness better through my connection with the office. I have gained in understanding in regard to the degrees there may be in the good and bad which lies in men and women. I know the city in which I was born and lived better. Is this not compensation? It is for me.

WHEN PRESIDENT DIAZ SOUGHT RECOGNITION

Similarity of Conditions Imperiling Mexican-American Relations in Hayes Administration and International Difficulties Preceding Obregon's Election

BY R. E. L. SANER

GENERAL ALVARO OBREGON was inaugurated President of the United States of Mexico, December first, in the presence of a distinguished body of Mexican and American dignitaries.

Governor Hobby of Texas, in response to a most cordial invitation of General Obregon, traveled fifteen hundred miles, accompanied by an escort of many official as well as unofficial Texans, in a special train as the guest of the Republic of Mexico to be present on this occasion.

General Obregon and a number of high Mexican officials had previously, in October, visited the Texas State Fair at Dallas, where Mexico had on display a splendid exhibition of her mines, fields and factories. This display was said by some to be even more elaborate than the Mexican exhibit at the San Francisco Fair. General Obregon spent nearly one week in Dallas, was lavishly entertained, and had an opportunity of meeting many of the leading men of the Southwest during his visit.

His attitude toward Texas, as well as the United States, was most cordial, as reflected in his public addresses. Numerous expressions of good will were heard from all of the Mexican delegation. which was most pleasing to their friends north of the Rio Grande. The visit of Governor Hobby, therefore, was in a sense a return of General Obregon's visit to the Texas State Fair.

It is, of course, obvious that the real object of General Obregon's visit to the Texas State Fair was to promote the entente cordiale and hasten the recognition of Mexico by the United States. And this recalls the interesting parallel which exists between comparatively recent Mexican conditions and the strenuous times of forty years ago, during the Hayes administration, when President Diaz was himself trying to obtain recognition from the government of the United States. The parallel is encouraging because it reminds us that Mexico once emerged into a state of comparative peace, progress prosperity and genuinely friendly relation with the United States from conditions which, in the retrospect, seem to have been quite as full of difficulty and menace as any which have followed them. The following statement will, it is hoped, serve to make it clearer.

Hayes and Diaz*

On March 4, 1877 Hayes succeeded Grant as President of the United States, elected by a slight and uncertain majority. His inauguration occurred just thirty days after Porfirio Diaz had assumed charge in Mexico City by right of successful revolution against Lerdo, and ascendancy over Iglesias, a counter-aspirant. The two or three years ensuing were years of great upheaval and unrest in the border states of Mexico. They were years also of weakness and indecision at Washington, due to the bitterly contested election and numerous factional intrigues; consequently a season of border troubles ensued, similar to that more recent "reign of terror" along the Rio Grande during the first term of President Wilson.

President Hayes in his first annual message referred to "disturbances along the Rio Grande" and to "lawless incursions into our territory by armed bands from the Mexican side of the line for the purpose of robbery," stating that these had been of frequent occurrence and that, in spite of the most vigilant efforts of our commanding forces, the marauders had succeeded in escaping into Mexico with their plunder.

Hon. John W. Foster, our Minister to Mexico, wrote a letter to the State Department in Washington in which he told of "a series of raids into Texas from Mexico resulting in murders, arson, plundering of Government post offices and custom houses, robberies and other outlawry."

Honorable William Evarts, then Secretary of War, made the statement to Congress that in consequence of this state of things the people in that portion of Texas bordering on the Rio Grande had

*I am indebted for much help in preparing this article to a paper by Mr. William Ray Lewis of the University of Colorado on "The Hayes Administration and Mexico."

suffered greatly and complained bitterly to his department.

Before going further with the list of our own aggravations, it is only fair to cite also that Mexico had certain grievances which afforded some ground for retaliation. General Ord, commanding our troops on the border, had upon several occassions been forced to cross into Mexico in pursuit of bandits and marauders.

The Salt War

There was, however, one episode on the Texas side of the line in 1877 which would seem to show that Mexican rights were trampled upon and Mexican blood shed at the hands of Americans. This was the Salt War which took place in El Paso County, the trouble lasting from September until December. This was in the nature of a personal feud growing out of interference by certain Texans with Mexican rights to the free use of salt from the Guadalupe Salt Lakes, ninety miles east of San Elizaro. Louis Cardis, a popular Mexican leader, was killed by Charles H. Howard, who with the County Judge and Justice of the Peace, was seeking to bluff the Mexicans out of their treaty-given rights. Such incidents furnished the Mexican press with a subject for "righteous indignation."

Taken as a whole, however, it appears that the grievances of United States citizens far outweighed those of Mexico. Perhaps the exact number of Americans slain at the hands of Mexican outlaws will never be known, but it was so large as to prompt most serious consideration on the part of the Hayes Administration.

To make the situation more serious, it was proved that the Mexican State and Federal officials were often implicated in these crimes. General Ord and the civil authorities asserted that they had undoubted evidence that the Kickapoos, who participated in the most violent and havoc-working raids in Texas, were harbored by Mexican authorities. The officer in command of the Mexican troops at Piedras Negras was reported officially to be not merely cognizant of the repeated thefts of American cattle, but to be protecting the raiders, and furnishing them with arms, and it was stated that on one occasion he had received a large portion of the booty so obtained.

In addition to those perils from murderers and raiders crossing the border into Texas and waylaying our travelers in Mexico, there was the formation of bands of revolutionists in border counties. These revolutionists had centers at Eagle Pass, Laredo and six large ranches on the Texas side. They were bent upon swooping over into Mexico and undertaking the overthrow of Diaz. On several occasions they crossed in large numbers but were defeated and chased back and dispersed on Texas soil, in open violation of the treaty with the United States. Some of these bands numbered as high as three hundred men and were organized in full view of the Texans whose lives and property were being continually outraged. They even purchased supplies in New York, $12,000 in one deal changing hands through a New York broker, and received one thousand rifles and much ammunition through New York via Austin. The terrorists were described as being "all the vagabonds of the neighborhood of Laredo, all those criminals who, being unable to live in Mexico, desired to aid in the organization of a government which, when established, would grant them immunity from punishment."

There were still other sources of aggravation. The evasion of promises by Mexican authorities and the postponement of remedial action until "mañana" were a continual source of exasperation to the United States officials.

Precedent for Pershing

On June 1, 1877 the Secretary of War of the United States issued an official order to the border troops under General Ord to cross the border, if necessary, to punish bandits and to recover property in view of the growing boldness of the outlaws. This order provoked loud protests and was denounced by the entire Mexican press as an insult to Mexican sovereignty. There seems, however, to be little evidence that this step was anything more than a friendly measure of protection and relief. The report of Secretary Evarts in 1878 states that United States troops had been engaged in enforcing neutrality law by preventing the crossing of our border by organized bands of revolutionists and by raiders from Mexico. His entire report is strong evidence of the sincerity of the United States in its claim that the order of June 1 was for protection and not aggression.

President Hayes, in his second annual message, explained that General Ord had been directed to co-operate with Mexican authorities and to be careful against giving offense to Mexico so far as possible, but to put an end to invasion of our own territory by lawless bands. He contrasted the mission of our armies, which crossed the border for punishment only, and that of the marauders from the Mexican side, with their deliberate and terrorizing work of devastation. He declared that both the Lerdo and Diaz governments had assured the United States that they had both the disposition and power to prevent and to punish such evasions and depredations. Secretary Evarts wrote in 1877:

> These incursions cannot be stopped so long as the government of Mexico is either unable or unwilling to punish the marauders and the United States is prevented from crossing the border in pursuit.

He interprets the order of June first more explicitly by stating that General Ord was

> To follow marauders when the troops are in sight of them or upon a fresh trail, cross the Rio Grande and until they are overtaken and punished and the stolen property recovered.

General Pershing evidently operated under similar orders in seeking out Villa after the Columbus raid. The military posts in the Southwest at San Antonio, Fort Brown, Ringgold and Fort Duncan, all of which occupied strategic positions commanding the crossings of the Rio Grande, were strengthened during the Hayes administration.

War Threatened

Bancroft, the historian, says in his History of Mexico, (Vol. VI, page 556);

> War in fact seems imminent. There is little doubt that Foster would have fomented hostilities if he could and President Hayes would not seem averse to such course.

A perusal of the newspapers of Mexico City at that time loudly decried the order of June 1 as a new invasion of Mexican sovereignty. President Diaz responded to the popular clamor in Mexico City against the order of June 1 by issuing a

counter-order to his army of the North to "repel with force any invasion of Mexican marauders." This, if carried out, would have inevitably resulted in war but because of a straitened treasury and internal revolution nearer Mexico City, Diaz was unable to carry out the order, even if he intended to do so. As it was, the tone of the threat seems to have strengthened him greatly in the affection of the Mexican people. In one instance, Diaz forces crossed the American border in pursuit of revolutionists.

A statute was enacted whereby American citizens were prohibited from owning land in Mexico. A little later this was extended to include title to mining properties, and all proposed railroad connections between the two countries were officially discouraged. Señor Mata resigned his post at Washington, professing disgust over the attitude of our government in delaying recognition of the Diaz administration and stating that he had little hope for a peaceable settlement. An effort toward making a treaty at this time was finally rejected by Diaz because of long delay of our government in awarding him recognition. This, indeed, gave Mexico a plausible ground for protest, as a year had elapsed since other powers had recognized his régime.

Vallarta, the Mexican foreign minister, in an interview with Foster, charged the Hayes administration with a departure from the former policy of the United States in not recognizing Diaz and declared that he had private advice from Washington to the effect that a scheme was being concocted for the annexation by the United States of the Northern Mexican States. He charged that the order of General Ord was a step toward this end, stating that an outright declaration of war would have been much more honorable and considerate.

Foster answered this insinuation of Vallarta's by saying that the United States was waiting to recognize Diaz only until assured that his election was approved by the Mexican people and that his administration possessed ability and a disposition to comply with treaty regulations. He insisted that his government would recognize Diaz as soon as he proved able to settle the border troubles. The winter of 1877 and 1878 dragged through without the expected open clash of United States and Mexican troops, but Foster states that there was an indescribable intensity of belief in Mexico that the United States sought either to absorb and exterminate all Mexico or, at least, to annex her Northern States. He admits that there was some foundation for the charge, pointing to a desire on the part of a faction in Washington to unify the administration and reconcile Tilden adherents by a war of conquest and the possible annexation of Mexican border territory.

It is likely that President Hayes was influenced by this element to the point of delaying recognition of Diaz. But it was extremely doubtful whether he had any part whatsoever in the dispatching of Vallejo and Frisbe to Mexico City. It is certain that there were many Washington persons in the secret and that these two gentlemen were empowered in some unofficial way. Foster was called to Washington in January, 1878, and it was without doubt largely through his visit that the intriguing faction in Washington was broken up. He had an opportunity to present in person the merits of the Diaz régime as deserving of recognition, and on April 11 he returned to Mexico City and announced the official recognition of Diaz. This act served to settle Mexican agitation temporarily and for a time great cordiality prevailed.

After Recognition

Early in 1878 President Diaz, in announcing his policy toward the United States, declared himself to be "resolved to act with full justice and animated only by a friendly spirit, although decided at the same time to admit nothing which would wound the dignity of Mexico." This statement is representative of all of his official utterances and executive dealings with the Hayes Administration. Anyone familiar with the temperament of the Mexican people will understand the defiant note in his expression.

Tension between the two countries remained high all through 1878, well into 1879. The Hayes administration declined to withdraw the order of June 1, 1877 until 1880. But little by little the frontier became better guarded and no open conflicts of the Federal forces ever occurred. As time passed and all counter-revolutions against Diaz broke down, he was enabled more and more to grip the reins of power, and to enforce law and order in the North Mexican states. Largely due to his own native tact and good judgment, and to his firm stand in international affairs, his nation grew rapidly in the esteem of the world powers and large foreign capital became interested in the development of her resources. Being of native descent, Diaz represented the best Mexican traditions and was able to hold to an advanced and liberal policy and to keep his Republic in the path of progress.

We may conclude that President Diaz was, through his long administration, friendly to the United States. Even during the very trying period each and every diplomatic question arising with the sister Republic was settled peaceably, satisfactorily and in the spirit of true international friendship. It was largely due to his own growing power that the Hayes administration was spared a complicated state of affairs and, indeed, a war which at one time was agitated on the part of an unworthy faction at Washington and might have proved a lasting blot on the fair page of the United States foreign policy.

It must be concluded also that President Hayes in his administration was entirely friendly and sincere in his dealings with Mexico.

The people of this section of the United States are in sympathy with the aspiration of General Obregon as outlined in his public addresses and quite naturally wish success to his administration.

Good and True But Solid Ivory

If juries are influenced by fear or favor, the institution of the jury box is a great danger for those twelve silent judges give their decision without reasons and without responsibility.—*Henry Matthews*, Former Home Secretary of England.

Nebraska Constitution Approved

At the special election in September the entire list of amendments to the Nebraska State Constitution was approved by a majority of the votes cast. These amendments, together with the portions of the old constitution not amended, will constitute the new constitution of Nebraska.

CURRENT LEGAL LITERATURE

MAY "one who happens to acquire property during the short span of his lifetime," control "its disposition throughout the ages" by giving it to charitable purposes in the form of a trust? Professor Austin W. Scott of Harvard sets this question for answer under *Education and the Dead Hand,* in the Harvard Law Review (November).

A buys from B a bill or note drawn by B payable to C on order. What are A's rights on the instrument against B? Can A confer on C greater rights than he himself had? Under the heading the *Rights of the Remitter of a Bill or Note,* Professor Underhill Moore of Columbia, in the Columbia Law Review (November) carefully answers these and collateral questions. Results are stated in language that is unusual. The ideas under the words are not new but the novel phrasing is helpful in stripping them naked.

Antoine Pillet, Faculty of Law, Paris, opens and closes an article on *Force as an Element of Pacification* in the Columbia Law Review (November) with these sentences: "I should have been very much astonished if I had been told thirty years ago that some day I should compose a panegyric on force"—"It is through having forgotten that political science cannot dispense with the aid of material force that the authors of the Treaty of Versailles have done a futile piece of work which is powerless to give the benefit of peace to exhausted Europe."

Roland F. Foulke's noteworthy book, *A Treatise on International Law,* is the subject of a valuable review by Professor Edwin M. Borchard in the Yale Law Journal (November).

A spirited plea for a more general use of *arbitration* is made by Percy Werner of St. Louis in the West Virginia Law Review (November). In the fact that in matters of procedure the Attorney has power to bind the client, he finds the reason for saying that upon lawyers more than upon any other class rests the responsibility for securing a more widespread use of voluntary tribunals.

Just what is the purpose, scope and merit of *the New York Landlord and Tenant Laws 1920?* The widespread movement to attempt to overcome the present housing shortage by legislation makes of general interest Harold G. Aron's discussion of these laws in the Cornell Law Quarterly (November).

The first of three articles on *Constitutional Law in 1919-1920* by Thomas Reed Powell of Columbia University appears in the Michigan Law Review (November).

There is represented in both the Virginia Law Register (November) and the American Law Review (September-October) an address by George B. Rose of Little Rock, Arkansas before the Tennessee State Bar Association on *The Industrial Crisis and the Bar.* It contains much material for sober thought and represents a very earnest consideration of the subject. One might speculate whether in the statement, "During the World War organized labor took advantage of the Nation's peril to boost wages to a point never dreamed of in human annals," "Manufacturers" and "prices" could not be substituted for "organized labor" and "wages" with equal approximation to truth.

The entire American Bar is indebted to the Massachuetts Law Quarterly (August) for making available Edward W. Sheldon's *historical sketch of the Association of the Bar of the City of New York.* It is indeed a most significant chapter in the history of the profession and of civil government in America.

Two able and very earnest men at the University of California, Jan Don Ball and Alexander M. Kidd, have together undertaken to help bridge the gap between *law and medicine in the matter of mental diseases* and other abnormalities. They have begun the publication of the results of their joint efforts in the California Law Review (November).

The growing body of current discussion of freedom of speech and the first Amendment to the Federal Constitution has been added to by an article prepared by Edward S. Cowin of Princeton University for the November issue of the Yale Law Journal.

Lindsay Rogers, Lecturer on Government, Harvard University, examines the constitutional provisions, the Federal precedents and State decisions in point and concludes that President Wilson's innovation of *signing bills after the adjournment of Congress* is both valid and to be favored on grounds of policy. Yale Law Journal (November).

Almost the entire November issue of the Illinois Law Review is devoted to memorializing the quarter-century anniversary of Mr. Justice James H. Cartwright's elevation to the Illinois Supreme Court. John T. Richards, discussing the application of the full faith and credit clause to suits for divorce, criticizes Haddock v. Haddock 201 U. S. 562 and comments on Mr. Justice Cartwright's opinion in Forrest v. Fey 218 Ill. 165. Mr. Justice Orrin N. Carter reviews the constitutional law decisions of Mr. Justice Cartwright and George Packard lists and comments upon the interesting cases decided by him. Brief biography was prepared by Clyde F. De Witt.

In the October number of the Wisconsin Law Review, Dean H. S. Richards of the Law School of the University of Wisconsin begins a discussion of the *Uniform Partnership Act* which has been adopted in Wisconsin. The American Bar will find this a valuable treatment of the subject because an able and authoritative writer is handling a matter of nation-wide interest.

Alan W. Boyd discusses in the Michigan Law Review (November) the Indiana Statute *regulating prices in the mining and marketing of coal,* and comments upon the decision of the District Court of the United States for the District of Indiana, holding the statute within the Constitutional powers of the state.

The initial number of the *Wisconsin Law Review* (October) is at hand. The Law School of the University of Wisconsin has undertaken the issue of this journal. It is to be a quarterly. "It will deal primarily with questions of Wisconsin law and with questions of general law which are of especial interest to Wisconsin." The first number has great merit.

MASSACHUSETTS SMALL CLAIMS COURTS

By Reginald H. Smith

THE first effort to establish a state-wide system for the hearing and determination of small claims was made by the Massachusetts Legislature in Acts of 1920, Chapter 553. This act marks the end of a period of experimentation in which pioneer small claims courts in Cleveland, Minneapolis, Portland, Chicago, Topeka, Leavenworth, and Kansas City have been showing the way. The Massachusetts act is unique in that it makes the small claims court an integral part of the judicial system, and should rank with the first Workmen's Compensation Act and Juvenile Courts Act as another important step in adapting the administration of justice to the conditions and ideals of modern society.

The Massachusetts act was made possible by the appointment in 1919 of a commission to investigate the judicature of the commonwealth under legislative authorization. The commission's investigation was to be made with a view to formulating recommendations which "would insure a more prompt, economical, and just dispatch of judicial business." The governor appointed three prominent members of the bar, who rendered their services without compensation. In January 1920 the commission advised that there was one subject on which it was prepared to report: "namely, the provisions for the informal hearing and prompt disposition of small claims under thirty-five dollars ($35) in the police, district, and municipal courts," and submitted a bill incorporating its views. This bill, with minor changes, was ultimately enacted into law. Although the commission examined considerable evidence before coming to its conclusions, it nevertheless reported that it felt "that the strongest evidence is to be found in the consideration of the matter as a question of practical common sense, * * *." In this the commission is in accord with the views of a critic who has recently written of the small claims court "that it is startling in the sanity of its procedure," which perhaps is the only thing startling about it. Indeed, it is so simple and reasonable that once accomplished, one naturally queries why it was not done before. Like the egg of Columbus, our legal system in this particular will stand up if the lower end of it is smashed a trifle.

The two outstanding features of the act are its application to every inferior court in the commonwealth, and the fact that it prescribes only the general outlines of procedure, conferring on the body of judges the power to regulate all details by their own rules, thereby making the system elastic and capable of growth.

Small claims sessions are presided over by the regular judges, thus assuring intelligent administration and justice according to law. The law avoids the rather fantastic reaction of establishing a new court presided over by a layman guided only by his own discretion—an oriental conception of justice which is out of place in an Anglo-American system.

The new procedure is alternative only and may be invoked on all claims in the nature of contract or tort, other than slander and libel, in which the plaintiff does not claim more than thirty-five dollars ($35). The thirty-five dollars has been fixed as an experimental maximum. The provision excluding slander and libel is based upon the theory that this kind of law-suit is well discouraged, since it is usually the result of hot heads which have had insufficient time to cool. The proceedings are begun by a simple statement to the clerk of the complaint, which the clerk records, and subsequently sends notice thereof by registered mail to the defendant. The court is enjoined to make rules providing for a simple, informal, and inexpensive procedure and for the early hearing of causes. Lawyers are not excluded from the court, but the simple procedure and small amounts involved render their presence unnecessary and unremunerative.

The plaintiff is deemed to have waived his rights to trial by jury and to appeal upon beginning a cause under the new procedure. In order to discourage the use by plaintiff of the formal procedure begun by writ for the purpose merely of adding costs taxed in such case, the act provides in effect that the court may eliminate costs in whole or in part as to any action which might have been begun informally.

If the defendant submits to the hearing of his case informally, he also waives his right to trial by jury and to appeal, but prior to the appearance day the defendant on proper affidavits may remove his cause from the small claims session to the Superior Court, in which case the defendant must pay the entry fee of $3. If the defendant removes his cause in this manner, he will not benefit greatly by delay, since the act provides that such removed case may be marked for speedy trial.

Through the power to stay the entry of judgment or the issue of execution, the judge is given an opportunity to decide how and in what manner the debt should be paid. This is of particular importance in cases where the debtors come generally from a class of persons not able to pay the entire sum in one payment. The court may also, in its discretion, transfer a cause begun under this act to the regular civil docket for formal hearing and determination as though it had been begun by writ, and may impose terms upon such transfer. This enables the court to prevent its docket from being clogged with cases whose peculiar nature obviously requires a more formal hearing and the presence of counsel.

I respectfully venture the suggestion that at this time there is hardly a more important or more constructive opportunity for service offered to our several state bar associations than to appoint special committees to study the small claims court idea, to adapt the machinery thus far worked out to the particular needs of each locality, and to urge the passage of such legislation as may be necessary to give the judges of our lower courts the power and equipment to adjudicate small claims promptly, inexpensively, and justly, according to law.

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FOR THE CHRISTMAS STOCKING

Deciding what one wants for Christmas is in general a rather difficult affair, but it is comparatively easy to surmise what the legal profession would like to have. The practicing lawyer wants, above all things, it is safe to assume, judges who will perceive at once the irresistible cogency of his arguments and the almost uncanny pertinency of his citations. He wants able judges who will take judicial notice of the patent fact that law and equity are on the side of his client, and who will need scarcely more than an intimation to perceive the utter baselessness of the claims of the opposing side. He wants judges who will help to solve the delays and difficulties resulting from the congestion of the courts by deciding, without unnecessary argument, the case in his favor and by taxing the costs on the other people. He wants judges who will aid the great movement for simplification of procedure by sustaining without question his demurrers even over the factious and unprofessional opposition of the attorney for his client's adversary.

In the matter of juries, he no doubt wants a better grade of men to occupy the box; men who will be proof against the wiles and allurements of the other side while remaining properly susceptible to the undoubted merit of the appeals which he makes on behalf of his client. He probably would like a jury system so simplified that a majority of perhaps two-thirds might render a verdict in his favor in civil cases, although the advantage of the unanimous verdict requirement in cases in which the lack of intelligence of the jury threatened an unwarranted decision in favor of his opponent might properly, if that were possible, be safeguarded in some effective way. He wants jurors who will not be susceptible in damage suits to feminine influences when his client happens to be a man and the defendant.

In the matter of clients, also, the lawyer wants, if not a greater number of them, at least a better grade; clients who do not manifest a nervous anxiety as to the outcome of the litigation, causing them to transgress too largely, conversationally, upon his office hours or other engagements; clients who are not obsessed with the idea of getting the litigation terminated, but realize that practice and procedure have a beauty all their own to the thoughtful mind, and that even a case may be lost with such skill of pleading, with such a nice regard for precedents and such consummate ability on the part of counsel as to justify no loss of confidence and not the slightest diminution in the fee.

Judges, no doubt, want more lawyers who will understand their cases and the value of the time of the court. They want lawyers who will accept the judicial dictum without argument and to a great extent without objection, thus not only expediting the trial of a case, but reducing the number of reversals on appeal. Judges of Appellate Courts, in particular, want lawyers who realize that it is not necessary, in order to get their cases properly before such bodies, to send up briefs which, from their size and bulk, would seem at first sight to be an attempt at an exhaustive treatise of the origin, development, growth and ramification of the entire science of law.

It is, of course, possible that the legal profession may not find all this in the stocking on Christmas morning. But it will surely find both a renewed satisfaction in belonging to a goodly company devoted to one of the noblest of pursuits and abundant opportunities for service to its fellow men.

THRIFT AND THE LAW

It is a most fortunate coincidence that at this time, when the example of the Pilgrim Fathers in many respects is needed for the guidance and inspiration of a generation which, to a rather alarming extent, has forgotten and ignored the good old-fashioned ideals of thrift, economy, conscientious performance of duty and thorough-going efficiency, those so-called "religious fanatics" should be brought on parade before us and their outstanding characteristics brought into clear and distinct relief. The word "relief" is used advisedly. We are in very urgent need

of "relief" from some of the modern tendencies.

The desirability, and indeed the necessity, of a reversion to the ancient homely virtues is not a matter of fancy or theory. It is of the utmost practical importance. Some of the

> Neither our own nor the world's salvation is to be worked out through any patent nostrum, through any miracle of statesmanship, through any government panacea. Surely we are going to be called upon nationally and collectively and individually to renounce extravagance and learn the old and new lessons of thrift and Providence.

These words of a close student of present day problems sum up a very important part of the answer to those problems. In the last analysis it will be found that it is the final homely virtues of thrift, conscientious, hard work and simple living which will restore our generations to soundness and sanity.

That is the rule of reason for our time. Larger production, greater individual saving of pennies for a rainy day. more extended ownership of homes, more economic independence on the part of laborers of all classes, abandonment of a hand-to-mouth policy, adoption of a farsighted view of the future and a realization that a perfect cooperation between those who work with their hands and those who work with their heads is absolutely indispensable for the salvation of both of those classes will prove to be the only permanent remedy for present day evils.

The man or woman worker who has money in the bank, who owns a home or an interest in one, who has invested in the industries of his or her country, who carries life insurance, makes a will and who pays his or her bills promptly, will almost invariably be found to be a law-abiding citizen who is interested vitally in everything which concerns the welfare of his or her native or adopted land, who will take part in performance of public duties, in the regulation of civic affairs and defense of the country's institutions, if need be.

The National Thrift Week plan, devised by the Industrial Department of the International Committee of Y. M. C. A., constitutes a most timely and valuable contribution to the welfare policy of the country; indeed, its importance can hardly be over-estimated. Lawyers, as well as, if not better than others, recognize the value of such a movement. To bring about conformance to the law is their natural province. To promote good citizenship is their inalienable privilege and a part of their high office. To promote prosperity

From every point of view, lawyers are constrained to favor, encourage and facilitate such movements for the good of the country and the good of its individual citizens.

AS A CONSERVATIVE FORCE

During the year 1920, one of the principal subjects of addresses to the various State Bar Associations was, not unnaturally, the lawyer's duty in relation to present conditions. The addresses of President Bradner W. Lee, of the California Bar Association, at the recent annual meeting; of President Leslie B. Snow, of the New Hampshire Bar Association; of Judge Carroll A. Nye, before the Minnesota Bar Association—to cite only a few—ably set forth the obligation of the lawyer in times as full of stress and change and uncertainty as these are, to stand firm as champions and exponents of the vital and fundamental principles which underlie our constitutional and representative government. As Judge Nye said in his address, "resistance, stubborn, earnest, determined resistance to all attacks on legal rights, whether they are made at home or come from abroad, has always been and still is the highest duty of the lawyer."

But the conception which the speakers generally have of the legal profession as a conservative force, standing against the poison of Socialistic doctrines, against anything tending to substitute the dictation of the few or the many for the ordered and orderly processes of the law, against too radical experiments of even less scope, is, of course, not synonymous with the blind conservatism which opposes change simply because it is change. On the contrary, the constructive part which the lawyer should play by reason of his professional knowledge and training, and the habit of leadership which the profession has acquired, is particularly emphasized. President Snow, for instance, declares that there should be "such collective action of the Bar as would place its organized strength at the service of the state," in the matter of shaping legislation. President Lee makes the same suggestion, but defines his proposal further. He would have the Bar Associations, through appropriate committees acting during legislative sessions, pay particular interest to legislative bills, examine them carefully, and in the public interest point out "those which appear antagonistic to constitutional limitations, or in conflict with other existing laws, or unnecessary and not in the interest of the general public good, or unskillfully prepared, or for any reason not calculated to be generally beneficial."

"FROM WHATEVER SOURCE DERIVED"

Consideration of U. S. Supreme Court's Decision in Case Holding Federal Judicial Incomes Not Taxable, with Genesis of Vital Phrase

By Harry Hubbard

IN *Evans vs. Gore* (253 U. S. 245; June 1, 1920), the Supreme Court held that the Sixteenth Amendment to the Constitution of the United States did not confer upon Congress power to levy an income tax upon salaries of justices or judges of United States Courts. Mr. Justice Van Devanter gave the opinion. Mr. Justice Holmes dissented and wrote an opinion in which Mr. Justice Brandeis concurred.

April 27, 1909, Senator Brown introduced a resolution proposing an amendment as follows (44 Cong. Rec. p. 1568):

> The Congress shall have power to lay and collect taxes on incomes and inheritances.

There was nothing here of that remarkable doctrine that prior to the sixteenth amendment Congress had power to levy an income tax though it had no power to apportion it as an income tax. Obviously, all there is to a tax is its apportionment, that is, prescribing who shall pay it and at what rate or on what basis. If there is no power to apportion a tax as an income tax, that is, *in proportion to incomes*, there is no power to levy an income tax. "A tax of $3,000,000,000 is hereby levied on incomes" enacts nothing. How much would any one pay? There is *no apportionment in proportion to incomes* and no tax. "A tax of $3,000,000,000 is hereby levied which is hereby *apportioned among the states in proportion to population*" would enact a head tax if anything at all. As Representative Champ Clark of Missouri said in the course of debate on the resolution proposing the sixteenth amendment (44 Cong. Rec. p. 4392):

> The Constitution provides that you can not levy a direct tax, except by making it a head tax. That is the plain English of it.

Mr. Justice Brown in his dissenting opinion in the Pollock case (158 U. S. 630) supposed a levy of $62,622,250, which would be $1 per head of all persons in the country at a certain census, and then said (p. 688):

> Assuming that the same amount of property in each state represents a corresponding amount of income, each inhabitant of South Carolina would pay in proportion to his means three and one-half times as much as each inhabitant of Massachusetts, in Mississippi four times as much as in Rhode Island, etc., etc.

Obviously, that is not an income tax (See also Harvard Law Review, April, 1920, p. 795, and p. 808, note 18). One might as well call an "income tax" one apportioned among the several states *in proportion to the number of acres* or *in proportion to the number of houses*, or *automobiles*. That such taxes might be *paid* out of income does not affect the question. So are most kinds of taxes.

Without apportionment, then, a tax is *absolutely impossible*, and it is the *kind apportionment* that shows the *character of the tax and gives its name*. As there was no power in Congress prior to the Sixteenth Amendment to apportion a tax in *proportion to incomes* there was no power to levy an income tax (but "excise" taxes might have been levied on occupations, etc.).

When, therefore, men say that prior to the sixteenth amendment there was power to levy an *income* tax, only it must be apportioned among the States *in proportion to population*, they contradict in the second part of this statement what they say in the first part. This remarkable statement seems to have appeared first about the time of certain replies to Governor Hughes' message hereafter referred to.

President Taft sent a message to Congress June 16, 1909, recommending an amendment to the Constitution "conferring the power" (note the words) upon Congress to levy an income tax)44 Cong. Rec. p. 3344).

The next day, June 17, 1909, the same Senator Brown who proposed said amendment April 27, 1909, (still knowing, as all knew, that an amendment to the Constitution was needed in order to confer power to levy an income tax), introduced the resolution proposing the amendment as follows (44 Cong. Rec. p. 3377):

> The Congress shall have power to lay and collect direct taxes on incomes without apportionment among the several states according to population.

This form began by giving Congress the power to levy income taxes, and then, in order to meet beyond question the existing prohibition of the Constitution as to "direct" taxes and the decision on the Pollock case (157 U. S. 429; 158 U. S. 630), mentioned by President Taft in his message of the day before, the form added "without apportionment among the several states according to population," and inserted the word "direct."

This proposed amendment was referred to the Finance Committee, of which Senator Aldrich was then Chairman, and on June 28, 1909, that Committee reported the proposed amendment *in a changed form*, the same as finally adopted as an amendment to the Constitution, to wit (44 Cong. Rec. p. 3900):

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Why were these changes in the amendment made by the Finance Committee? The Supreme Court does not refer to the fact of the changes, or offer any explanation. Neither does Senator Root nor Senator Borah. Note that in the Finance Committee the word "direct" had been taken out, and the words "from whatever source derived" had been inserted.

After an article on the Sixteenth Amendment published in the Harvard Law Review, April, 1920. in which the writer set forth reasons for his view that the amendment authorized Congress to levy taxes on all incomes including among others those from bonds and other securities issued by States, cities and other subdivisions of States, and from

salaries and wages paid by them, the writer rereived a letter from Senator Knute Nelson, who was in 1909 a member of the Judiciary Committee of the Senate, and is now Chairman of that Committee, dated May 7, 1920, in which Senator Nelson wrote:

> I thank you very much for sending me a copy of the Harvard Law Review containing your article on the Sixteenth Amendment, which I have read with much interest. I am glad to see that you concur in my views. The words "from whatever source derived" were inserted in the amendment in the Senate at my instance and on my insistence. I have been very sorry to see that the Supreme Court in its decision, has utterly ignored the phrase; in fact, treated the amendment as though this phrase were not a part of it.

In a later letter, September 10, 1920, Senator Nelson wrote (as to the above quoted statement):

> You have the liberty to use my statement quoted in your letter. The record may not show it but I introduced the amendment and the facts are that at that time Mr. Aldrich was Chairman of the Finance Committee and I discussed the matter with him and insisted on the amendment being inserted and he concurred with me and reported the bill with the phrase "from whatever source derived."

Senator Aldrich was, as everyone knows, the real leader of the Senate, especially in all financial matters. He knew what he was doing.

Here, then, is the history of these words of the amendment. The word "direct" was taken out, in order not to limit income taxes to those which were "direct," (and which were held invalid in the Pollock case), and the words "from whatever source derived" were inserted, in order to make the power to tax incomes *as broad as "incomes" themselves could possibly be.* Thus the amendment was changed and reported by the Finance Committee, passed by the Senate and House, and ratified by the legislatures in more than three fourths of the States.

It is respectfully submitted that the Supreme Court has given no sufficient reason for not giving effect to these ordinary, plain words of the amendment.

Governor Hughes, in a special message to the New York State legislature, on January 25, 1910, said, among other things, (Foster Federal Income Tax, 2nd Ed. p. 78):

> The comprehensive words "from whatever source derived" if taken in their natural sense would include not only incomes from ordinary real or personal property but also incomes derived from state and municipal securities.
>
> (P. 79) We can not suppose that Congress will not seek to tax incomes derived from securities issued by the state and its municipalities. It has repeatedly endeavored to lay such taxes and its efforts have been defeated only by implied constitutional restriction, which this amendment threatens to destroy.

Afterwards appeared a letter from Senator Root (Foster Federal Income Tax, 2nd. Ed., p. 84). At the time when the resolution proposing the amendment was before the Senate and House (April, June and July, 1909) Senator Root was not a member of the Finance Committee, (when the Chairman and leader, Senator Aldrich, revised the language of the amendment at the instance of Senator Nelson), nor was he then a member of the Judiciary Committee of which Senator Nelson was then a member. Senator Root was then a new Senator, having recently been a member of the Cabinet of President Roosevelt.

Senator Root does not appear to have had any part in proposing or revising the form of the amendment. His letter is remarkable in several respects. He writes:

> There was no question in Congress or in the country about the taxation of state securities. No one claimed that the inability of the government to tax them was an evil.

One only had to turn to the Pollock case (157 U. S. 429; 158 U. S. 630) which was what led to the adoption of the Sixteenth Amendment, to read in the statement of the case by the Supreme Court that the defendant, the Farmers Loan & Trust Co. had (147 U. S. 429, 430)

"At least two millions in bonds of the City of New York;" and (p. 430): "That the company derived an income or profit of about $60,000 per annum from its investments in municipal bonds;" and in its opinion the court states (p. 555) that it is the contention of the complainant "Third, that the law [i.e. Act of Congress] is invalid so far as imposing a tax upon income received from state and municipal bonds;" and (p. 584) the court expressly held and stated that there was no power under the Constitution to tax incomes from state or municipal bonds, or salaries of state or municipal officers.

Thus, instead of "no one claimed that the inability of the government to tax them was an evil," a majority of Senators and Representatives in Congress had deemed it an "evil" that they were not taxed and passed an Act of Congress taxing them as well as other incomes (28 Stat. 509). See also, the quotation, later in this article from Senator Brown, who introduced the Sixteenth Amendment, and the letter above quoted from Senator Nelson, who had the language of the Amendment revised by the Finance Committee, both of whom deemed such non-taxation an "evil." See, also, the above statement by Governor Hughes that Congress "has repeatedly endeavored to lay such taxes."

Further, Senator Root writes (*ibid*):

> The inability to tax them did not arise from the terms of the Constitution but from the fact that being the necessary instruments of carrying on other and sovereign governments, they were not the proper subject of National taxation, and that therefore no provisions of the Constitution, however wide the scope of their language, could be held to apply to such securities, or to the income from them.

If this is intended to mean that no amendment to the constitution "however wide the scope of its language" can authorize such a tax, Senator Root is clearly in error, and there is no ground whatever on which to base such a statement. The United States Government has *whatsoever* powers are conferred by the Constitution or by amendments, subject to one and only one limitation, that (Cons. Art. V) "No State, without its consent shall be deprived of its equal suffrage in the Senate." (See, also, Harvard Law Review, April, 1920, pp. 798-804.) "To extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority," are the careful words of Mr. Justice Story, in Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 324, 325. There is, moreover, no difficulty in having an amendment remove an *implied* limitation upon the power of Congress, any more than an *express* limitation.

It is no objection that such an amendment affects the sovereignty of the States. That is the usual and proper object and result of amendments to the Constitution, to increase that portion of

sovereignty which is in the United States and to decrease that portion which is left in the States (these portions being complements of each other). The Prohibition amendment and the Suffrage amendment both did this, as also other amendments. This process may go on until there is little left to the States of what were once their functions and powers. Call this "destroying the States," if one will, there is nothing to prevent the continuation of the process. On the contrary there is express provision in the Constitution that it may continue by amendment, subject only to the provision above quoted from Article V. Test the question. So long as each State has two Senators representing it in the Senate, no court has any ground whatever for holding that there is anything in the Constitution, or in constitutional law, express or implied, to prevent the adoption of an amendment expressly conferring upon Congress power to levy income taxes upon *all* incomes whatever. That would be for the court, a creature of the Constitution, to set itself above the Constitution, and above the people, and in a matter which is purely *political.*

It is conceivable (though not probable) that the States might by amendments even reduce themselves to the condition of Counties in England, or Departments in France, so long as equal representation in the Senate was preserved. But this is a political matter, and the court is not the keeper of the nation in such matters. The nation is not in a straightjacket as to amendments and changes, as some advocates of alleged "States rights" would have us believe; and this is wise, for the sake of peaceful and orderly development, instead of revolutionary.

If this statement of Senator Root was intended to mean that in the nature of things there is some unwritten constitutional law (that cannot be changed even by an amendment to a constitution), that one sovereignty cannot tax bonds or incomes from bonds issued by another sovereignty, there is no basis for such a statement. Bonds and incomes from bonds of Great Britain, France and other sovereignties are taxable and taxed by the present United States income tax law, and by the laws in nearly, if not all, our forty-eight states; and bonds and incomes from bonds issued by any one of the forty-eight states or their municipalities are taxable in all the forty-eight states.

Senator Root in his said letter, and Senator Borah in the Senate, in February, 1910, (seven months after Congress had passed the resolution proposing the amendment, in the form introduced by Senator Brown, and changed by the Finance Committee at the instance of Senator Nelson of the Judiciary Committee, as above stated), when neither Senator Root nor Senator Brown had any function or jurisdiction to alter or construe the language of the amendment, any more than any private citizen, set forth an argument which, stated in the form of a syllogism, was substantially as follows, and this is apparently similar to the argument made by Mr. Chief Justice White in his dictum in the Brushaber case, (240 U. S. 1, 17-18), which dictum was quoted with approval by Mr. Justice Van Devanter in *Evans* v. *Gore,* such argument being:

(a) Prior to the sixteenth amendment Congress had power to levy income taxes, provided Congress apportioned direct taxes on incomes among the several states in proportion to population as shown by the last census.

(b) The sixteenth amendment rendered it unnecessary to apportion direct taxes on incomes in proportion to population.

(c) Therefore the *only* purpose and effect of the sixteenth amendment was to make such apportionment unnecessary.

(d) Therefore, the amendment does not confer power upon Congress to tax incomes from state and municipal bonds, and salaries, or justices' salaries.

As a matter of logic a more complete *non-sequitur* would be hard to find. (a) and (b) may both be true, and (c) and (d) do not follow at all. It is perfectly consistent with (a) and (b) that the words "from whatever source derived" were inserted and the word "direct" stricken out in the Finance Committee for the express purpose of making it clear that the amendment was giving power to tax incomes from *all* sources whatsoever, (and this was the purpose of Senator Nelson in having those words inserted); and there is not the slightest reason as a matter of constitutional law to question that an amendment to the constitution may accomplish that purpose, notwithstanding state sovereignty or former decisions of the Supreme Court. The argument is directly contrary to the language of the amendment and the very words and grammar of it. Also, as above stated, the premise (a) is self contradictory and not true in fact.

Furthermore, whatever, before the sixteenth amendment was the power which Congress had to lay "excises" on corporations or individuals, or "direct" taxes apportioned among the States according to population, there was nothing to prevent by amendment to the Constitution a grant which should be *complete in itself* and clearly give power to levy a straight income tax. After the decision in the Pollock case (which decided that *certain* incomes could not be taxed) it was eminently proper that there should be such a *complete grant of power to tax all incomes.* It was repeatedly urged that power to levy an income tax was needed to provide for the event of war, and obviously no half-way power would be appropriate. No nation confronted with a long war (or even in peace) ought to exempt so many hundred of millions of dollars or even billions (constantly increasing) of such annual incomes of individuals from all income taxes whatever, while levying high taxes on all other incomes above $1,000, such as those from ordinary wages, salaries, mortgages on real estate and securities of railroads and other public utilities. The injustice is obvious, to say nothing of the folly of a nation thus tying its own hands.

Never, from the time the proposed amendment was first introduced by Senator Brown, as above stated, did such amendment have either the *form* or *substance* of *supplement to existing power,* such as has been argued by some in order to try to prove a case for exemptions. No such amendment was made as that

> It shall no longer be necessary to apportion "direct" taxes on incomes among the several states in proportion to population.

The equivalent of that was proposed in the Senate and voted down. Senator McLaurin moved (as a substitute for the said amendment, introduced by Senator Brown and changed as stated above by the Finance Committee, which became the sixteenth amendment), 44 Cong. Record, p. 4109:

> Amend the joint resolution by striking out all after

line 7, and inserting the following to wit: "The words 'and direct taxes' in clause 3, section 2, article I, and the words, 'or other direct' in clause 4, section 9, article I, of the Constitution of the United States are hereby stricken out."

This proposal the Senate rejected (44 Cong. Record, p. 4120); and it adopted the sixteenth amendment the language of which is very different from this both in substance and form. The Senate wanted to have a *distinct grant of express power to levy taxes on all incomes.*

How can the court say that this amendment "does not purport to confer power to levy income taxes in a generic sense"? This grant of "power" was made in *express* and *general* words, and not only made *no exceptions* as to what incomes Congress should have power to tax but inserted the words "from whatever source derived" and struck out the word "direct," so as to make the power as broad as "incomes," and cover the entire *genus*. How could anything be made clearer? If the amendment had been made to read "tax incomes from whatever source derived *and from municipal and state bonds and salaries and justices' and judges' salaries,*" there could have been no doubt whatever as to the right or power to make such an amendment. It is submitted, however, as a plain matter of English language as well as of law, that such further words (those in italic) were not necessary, or proper, in order that Congress might have power to tax all such incomes and any others.

Mr. Justice Van Devanter in *Evans* v. *Gore* says that Governor Hughes' message "promptly brought forth from statesmen who participated in proposing the amendment such convincing expositions of its purpose, as here stated, that the apprehension was effectively dispelled and ratification followed."

As above shown, Senator Brown proposed the amendment, and it was referred to the Finance Committee, and Senators Nelson and Aldrich and the Finance Committee changed the language. The "convincing expositions" were the arguments above referred to stated in said letter of Senator Root and the speech of Senator Borah, and similar arguments. These arguments were made, as any private citizen might have made arguments, *more than seven months after the Senate ceased to have any function as to the proposed amendment.* Neither Senator Root nor Senator Borah seems to have had any part in proposing the amendment, other than voting on it as it was finally reported to the Senate. Neither of them was a member of the Finance Committee that changed and reported it as above stated.

The Senate declined to join Senator Borah in his (seven months later) "exposition" of the meaning of the amendment. He introduced, February 8, 1910, a resolution as follows (45 Cong. Rec. p. 1694):

> Resolved, that the Committee on the Judiciary be and is hereby directed to report to the Senate as early as may be practicable whether, in the opinion of the Committee, the proposed amendment to the Constitution of the United States, as submitted to the States for ratification at the special session would, if adopted, authorize Congress to lay a tax upon incomes derived from state bonds and other municipal securities or would authorize Congress to tax the instrumentalities or means and property of the states or the salary of state officers.

The Senate declined to adopt this resolution, but left it on the table (45 Cong. Rec. p. 2247). Senator Borah was on the Judiciary Committee; but so was Senator Nelson, and perhaps others with Senator Nelson's views, and Senator Aldrich's views. Senator Borah did not press his resolution to a vote.

Senator Brown (who introduced the amendment), said (45 Cong. Rec. p. 2246, Feb. 23, 1910):

> But, Mr. President, let it be assumed for the sake of the debate that the conclusion of the Senator from Idaho is wrong and that the position of the distinguished Governor of New York is right when he contends the proposed amendment confers on the Federal Government the power to tax incomes arising from state or municipal securities. It does not follow that the amendment should be rejected; on the contrary, it follows that it should be ratified. Because, under that interpretation, all incomes would be treated alike. No exemptions would be allowed and no exceptions permitted save as Congress might and should exempt all incomes up to a certain amount. There is a homely and rugged notion in the average American heart that the burdens of Government should rest on everybody instead of somebody. There is also a somewhat enthusiastic sentiment abroad in our land that the burdens should be borne by everybody in proportion to their ability to bear them, without regard to whether these abilities accrue from investment in farm lands or railroad stocks or state bonds. As a matter of common equity and even handed justice to the entire citizenship of the country, to exempt one class of incomes and tax another is abhorrent. Under the New York argument the man who earns an income by his labor is properly taxable; the man who collects dividends from stocks in individual enterprises—railroad, mercantile and manufacturing—is properly taxable; but the man whose income arises from investments in state or municipal bonds should be exempt from the income tax.
>
> On its face the proposition does not commend itself. It does not square with the doctrine of equal rights. It is hateful to every sense of justice. It can not be defended in principle nor can it be used successfully in my judgment to defeat this amendment.

There is no evidence that the legislators in the several states subscribed to the view of Senator Borah and Senator Root, instead of these views of Senator Brown who introduced the amendment and Senator Nelson, and Senator Aldrich, and the Finance Committee who changed the language of it. Legislators might have subscribed to Governor Hughes' view as to its *meaning,* and for that very reason desired its ratification.

Some of the States ratified it *before* they could have even heard of the view of Senators Root and Borah. Are they bound by such view?

Most of the legislators in the several states probably never heard at all of such view, for neither the Congressional Record nor the New York newspapers circulate much among legislators in most of the states. Legislators were fully as likely to subscribe to the sentiments of Senator Brown above quoted as to those of Senators Root and Borah. *The Supreme Court could not possibly know what was in the minds of the hundreds or thousands of legislators in the thirty-six or more States when they voted to ratify the amendment.* There is, therefore, no evidence that a court of law could for a moment consider as evidence, that "ratification followed," *because* legislators subscribed to the view of Senators Root and Borah, or that legislators generally had ever even heard of that view. There is nothing to show that ratification was not based, as it always should be in such cases, *on the very words of the amendment itself.*

Mr. Chief Justice White in that part of the Brushhaber opinion quoted by Mr. Justice Van Devanter in *Evans* v. *Gore,* states that the purpose of the amendment was "to relieve all income taxes from apportionment from a consideration of the source whence the income was derived." If the freedom from "apportionment" (among the several states in proportion to population) is to be as to *all* "incomes, from whatever source derived," why is not also the "power to lay and collect taxes on incomes" to include *all* incomes?

How can one read these *same* words, "from whatever source derived," in the *same* sentence, one way as to *apportionment* and another way as to *"power to lay and collect taxes on incomes"?*

Furthermore, the words, "from whatever source derived" were not needed in order to do away with the necessity of apportionment among the States. The form of the amendment as it stood before those four words were inserted at the instance of Senator Nelson already did away with such apportionment.

But why does the learned Chief Justice call such taxes as were required to be "apportioned" (among the several states in proportion to population) "income taxes"?

If one considers as a matter of grammar the exact words of the amendment it is obvious that they cannot be parsed as a sentence in English in any other way than to hold that the words "from whatever source derived" are an *adjective* phrase describing the kinds of incomes on which "The Congress shall have power to lay and collect taxes." These words "from whatever source derived do not and can not modify the *adverbial* phrase "without apportionment among the several States, and without regard to any census or enumeration."

The amendment is parsed as follows: "The Congress" is the subject; "shall have power to lay and collect" is the predicate; "taxes on incomes" is the object; "from whatever source derived" is an *adjective* phrase describing the kinds of "incomes" on which "Congress shall have power to lay and collect taxes"; and "without apportionment among the several States, and without regard to any census or enumeration" is an *adverbial* phrase modifying all the words of the amendment that precede, and telling what need *not* be done in the *manner* of laying and collecting taxes.

Someone has suggested that a "startling" change in a constitution needs "express terms" in an amendment, and not "general language" (Harvard Law Review, Nov., 1920, p. 71.) This suggestion certainly has the merit of novelty. Under it the Prohibition Amendment should have read "whiskey, brandy, alcohol, gin, rum, vodka, apple-jack, beer, wine, cordial," etc., etc., mentioning each *species* by name, instead of prohibiting the entire *genus* "intoxicating" liquors. It is not quite obvious what "principle" requires that an amendment should be so laborious, nor why the framers of an amendment should be deprived of the ordinary convenience and certainty to be had by the use of "general" words.

Even if it be admitted that taxing incomes of individuals and corporations from State and municipal bonds was "startling," (though, as Governor Hughes said, "Congress has repeatedly endeavored to lay such taxes"), how can any one claim that the "express," though general, words of the sixteenth amendment "incomes, from whatever source derived," are not just as "startling," and broad and all inclusive enough to notify any one that *all* incomes are taxable? Obviously, *general* words were used in order to include the entire *genus,* and not let any *species* of income escape, just as *general* words were used in the Prohibition Amendment in order not to let any *species* of "intoxicating" liquor escape. When words indicating an entire *genus* are used, it requires an express *exception* of a *species* in order to exclude it from such *genus,* and not a *mention* of a *species* in order to include it. Any other rule is unthinkable, and would make havoc of all logic and language.

By the way, what is a "startling" amendment to a constitution in a *legal* sense so that a court may recognize it as such?

The sixteenth amendment was an amendment to the *entire* Constitution. The voice that uttered the words had power to regulate the salaries, functions and even existence of the offices of judges and justices of all United States courts, even to abolish any or all of them. Nothing in the original Constitution, such as the provisions aimed at securing that the courts be, to some extent, independent of the Congress and of the President, which provisions were referred to at length by Mr. Justice Van Devanter in his opinion in *Evans* v. *Gore,* could by any possibility be construed as preventing an amendment to the Constitution from providing for taxing or reducing the salaries of judges or justices. An amendment can amend all those provisions, as well as any other, except only the provision for equal suffrage of each State in the Senate.

It may be added that the so-called independence of the judiciary is not by any means complete, and in the nature of things can not be, however desirable that might seem. Judges and justices are dependent upon Congress to levy taxes and make appropriations to pay them any salaries at all, also to increase their salaries from time to time when in the course of economic events they have become inadequate; and it has been the fact, several times heretofore, and now is, that justices' and judges' salaries are far from adequate, and are much less than these learned men could easily earn in the practice of law. The courts are also dependent upon Congress and the President to provide funds and officers to enforce the decrees and judgments of the courts.

Exemptions from United States income taxes render it difficult to make a fair distribution of the great burden of such taxes. So urgent is this reason that during the war Congress abandoned the earlier policy of making United States bonds exempt from all taxes, even though such exemption would have made the sale of such bonds much easier and for higher prices. It is submitted that it is absurd for a great nation like ours while taxing incomes from its own bonds to exempt wholly from United States taxation incomes derived from bonds of States, counties, cities, towns, villages, districts and every other conceivable political subdivision already created or which may hereafter be created in the entire country, and the salaries and wages paid to the officials and employees, amounting to hundreds of millions if not billions of dollars every year, paid by these subdivisions of the nation. No other civilized nation recognizes any such idea, that every little part of the nation is greater than the whole, or places its national government at such a disadvantage.

Someone recently urged that incomes from securities issued by public utility companies ought also to be exempt on the ground that they serve localities the same as cities, towns, villages, etc., etc., do in the matter of water works, gas and electric plants, street railways, etc., and that the public really pays the income tax by paying rates increased by that increased cost of capital which is owing to the tax on incomes from public utility securities. The States charter public utility corporations and regulate them and their rates, and in a sense they are agencies of the states. Incomes from their securities, however, are taxed by the United States. But if the States charter cities, towns, villages, districts, etc., to perform these same services to the public, incomes from securities issued by them are exempt from all United States taxes be-

cause they are technically "agencies of the States." It is submitted that the distinction is very technical so far as United States income taxes are concerned, and unfair to those localities that do not have municipal ownership; and it was proper to abolish this distinction, as well as others, by the Sixteenth amendment, which gives Congress express power to tax "incomes, from whatever source derived."

Furthermore, a very excellent economic and political reason exists for abolishing such distinction, namely, that such distinction directly and unavoidably encourages state and municipal ownership of railroads, street railways, gas and electric plants, and socialistic experiments, such as that in North Dakota, etc., etc., with all the attendant inefficiency, extravagance, waste and corruption that attend government operations, where public officers are spending money, the old case of one man spending another man's money; and it is hopeless to expect anything better so long as human nature is what it is and has been for ages passed and will be for ages to come.

This decision of the Supreme Court, unfortunately, (for it is always unfortunate not to have a case fully argued), seems to have been rendered without any argument whatever having been made by counsel for the Government that the sixteenth amendment gave Congress power to tax all incomes, including justices' and judges' salaries; for, Mr. Justice Van Devanter said:

> Counsel for the Government say "it is not, in view of recent decisions, contended that this amendment rendered anything taxable as income that was not so taxable before."

It is respectfully submitted that the "recent decisions" referred to were in reality not decisions, but only expressions of views not necessary at all to the decisions of the *cases* actually before the court and not the reasons for the decisions the court actually rendered in such cases, (it is only in *cases* that the Court has any jurisdiction to render "decisions"); and that no such decision had been rendered until that in *Evans* v. *Gore*. It is also respectfully submitted that the decision in *Evans* v. *Gore* is erroneous.

Greenwich, Connecticut.

LAW OF THE SEA AND THE GREAT WAR

BY EDMUND F. TRABUE

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OUR part in the war before entering it as a combatant had been in controversy with Great Britain and Allies, with Holland, and with the Imperial German Government.

Notwithstanding the intense sympathy of a large majority of our people with the Entente cause, our duties as a neutral before entering the war required that we demand the rights of a neutral under international law. Upon our entering the war our quarrel with the Entente, of course, vanished, and even previously we were always at a disadvantage in controversy with them for they were fighting a cause so clearly our own that we afterward adopted it. Furthermore, we were greatly handicapped in our dispute with them by their continual discovery of artifices perpetrated by our shippers in attempts to furnish Germany with articles contraband. It was the right of such shippers to make the attempt to land their goods in Germany, taking the chances of success or loss, and of the Entente Allies to prevent its success if possible. Our controversy with the Entente Allies was twofold:

First: Over the right they claimed to intercept our shipments to Germany or to a neutral *en route* to Germany, and

Secondly: To intercept and censor our mails.

(1.) Interception of Neutral Goods

The right to interrupt a shipment of contraband, absolute or conditional, and to search, and if justifiable seize, a cargo was an ancient and indisputable right existing to different extents in different ages. The *Consulat de la Maer or Consulato del Mare* dating from the 14th century, is said to be the oldest code surviving.[1] The rules of this code were

a. Enemy goods on the ship of a friend are good prize.

b. In such case the captain of the neutral ship should be paid freight for his cargo so confiscated as if he had taken it to its primitive destination.

c. The property of a friend on an enemy vessel is free.

d. The captors who have seized an enemy vessel and brought it into one of their ports should be paid freight on the neutral merchandise as if it had been carried to its primitive destination.

The French regulations of 1744 and British Mem. of 1753[2] brought the law of capture at sea to principles remarkably like those we treat as ruling today, so we see that the law on the subject is the growth of ancient rules modified by common consent, or by treaty, according to the requirements of the times; but it is *law* as opposed to *anarchy* or *barbarism*. In the Seven Years War the so-called rule of 1756 was announced.[3] No state then allowed any but its own ships to trade with its colonies, but France was unable because of the British Navy to carry on such trade, and opened it to the Dutch. The British thereupon ordered that all neutral ships laden with cargoes from the colonies should be captured and brought before the prize courts, and many were seized. The ground was that the neutrals had no right to enjoy a trade closed to them in time of peace and thus assist one belligerent by adding its merchantmen to that belligerent's shipping.

The seizure was regular, the merchantmen being warned to stop and being visited and searched and sent to a British port in charge of a prize crew. The rule forbade such prizes being destroyed. Resentment against the British acts was one of the causes which led the Northern powers to combine against her and formed the league known as the Armed Neutrality of 1780.[4] Private property belonging to a belligerent's subjects when found on neutral ships was treated as subject to capture till

*Address before the Louisiana Bar Association, May 17, 1919. Reprinted from Virginia Law Review.

1. *Graham Bower*, Am. Journ. Int. Law, Vol. 13, No. 1, Jan., 1919, p. 63.

2. 53 Am. Law Rev. 33.

3. Am. Journ. Int. Law, Vol. 9, No. 2, July, 1915, p. 584.

4. Omond, p. 8.

that

the middle of the 17th century, when the Dutch asserted the doctrine that a belligerent's subjects' property on neutral ships could not be captured. This doctrine was expressed according to the formula "Free ships, free goods." The theory invoked was that the ship was part of a neutral country afloat, and that a belligerent might not invade it and confiscate his enemy's property. Frederick the Great in 1752 invoked this doctrine but afterward receded and recognized the British doctrine previously obtaining.[5] The doctrine "Free ships, free goods," was never generally adopted.

Essentially real freedom of navigation during the 18th century did not exist.[6] The rule of 1756 received new impetus at the outbreak of the war of 1793 owing to a neutral protest against Great Britain's prohibition of trade with her enemies' colonies. The British proclamation forbade vessels carrying the French West Indian products to Europe, but was silent as to a neutral vessel's sailing from Europe to the French colonies, and traffic between the West Indian Islands and the United States. A relaxation of the rule of 1756 was made by the British order of January, 1798, as to trading vessels laden with produce of French, Spanish or Dutch settlements brought in for adjudication when bound to a European port not a port of Great Britain, nor of the neutral to which the vessel belonged. When neutrals saw that they might carry from hostile colonies to England or to their own ports they endeavored to find a way of unqualified trade with the colonies, and to carry between the colonies and mother country where better prices could be secured; so they began to carry to their own ports and re-export to a belligerent port. Hence the germ of continuous voyage.[7] United States vessels were peculiarly favored for adopting this plan when desiring to carry from French, Spanish or Dutch colonies to their respective mother countries during the war between England on one hand and France, Spain and Holland on the other so far as the trade related to colonies in the new world.[8] This scheme frustrated England's purposes. Accordingly, she attempted to insert in the Jay Treaty a provision against the trade, and it was stipulated in the project of the treaty that West Indian products imported into the United States should not be re-exported during hostilities; but this article was excluded when the Treaty was ratified. At the close of the 18th century numerous cases arose involving the doctrine of continuous voyage.

International law was recognized by us even before adoption of our Federal Constitution, and by the Ordinance of December 4, 1781, concerning marine captures we professed obedience to international law "according to the general usages of Europe."[9]

The rule of the *Consulato del Mare*, hereinbefore mentioned, was apparently recognized by our judiciary at the outset as embodying the rule of capture at sea[10] and Mr. Jefferson's statement to M. Genet is called a classic.[11]

5. Omond p. 10.
6. *Harmodie Arias*, Am. Journ. Int. Law, Vol. 9, No. 3, July, 1915, p. 583.
7. See further *Lord Justice Kennedy*, Rep. Int. Law Asso. 550, 1908 p. 41; citing Westlake, p. 255.
8. Arias, 587 citing Wharton, 3383.
9. *Hannis Taylor*, Int. Pub. Law, § 103, p. 136; *Graham Bower*, 53. Am. Law Review. 29.
10. Taylor, § 650, p. 715 citing The Nereide. 9 Cr. 418.
11. *H. S. Quigley*, Am. Journ. Int. Law, Vol. 11. p. 825. See also 39 Am. St. Pap. For. Rel. I., pp. 166, 7; Kent. Com., 8th ed., p. 126.

Early in our history we protested against the Treaty of 1691 between England and Sweden constituting money, provisions, horses and their accoutrement contraband, and Denmark joined in this protest. The controversy thus arising was settled by the Jay Treaty, 1794, concluded by Washington, Jay, Pitt and Lord Grenville specifying absolute contraband, and reciting the difficulty of defining conditional contraband, and providing that whenever any articles so becoming contraband according to the existing laws of nations should be for that reason seized they should not be confiscated, but their owners speedily and completely indemnified; and the captors or, in their default, the government under whose authority they acted should pay the masters or owners of the vessel carrying them the full value of all such articles with a reasonable mercantile profit thereon, together with the freight and demurrage.

In 1803 a treaty was made between Great Britain and Sweden which also provided for preëmption rather than confiscation, and these two treaties would seem to establish the doctrine of preëmption as affecting Great Britain. Lord Stowell in The Haabet,[12] announced the doctrine as "a mere mitigated practice" prevailing "in later times."

Great Britain's maritime code was suddenly relaxed in the interest of neutral trade in the war of 1854-6.[13] Hitherto a neutral could not by his flag protect a belligerent's property. The Armed Neutralities of 1780 and 1800 had failed to shake the rule of 1756 and the doctrine of continuous voyage which had been elaborated in defiance of the rule; but Lord Clarendon, Secretary of Foreign Affairs, when the Russian war began in 1854, had resolved to change the rules of naval warfare, and addressed himself privately to France and the United States suggesting the abolition of privateering, and other reforms, and that the great maritime powers had a right to effect the change in the interest of humanity. There were, however, differences of opinion in the Cabinet. Lord Clarendon said:[14] "Her Majesty will waive the right to seizing enemy's property laden on board neutral vessels, unless it be contraband."

The Treaty of Paris was signed March 30, 1856, but contained no article dealing with maritime law, and Count Walewski proposed that the plenipotentiaries should before separating make a declaration constituting a remarkable advance in international law. The Declaration of Paris was signed April 16th provding:

> (a) privateering is and remains abolished, (b) the neutral flag covers enemy goods except contraband of war, (c) neutral goods except contraband are not liable to capture under an enemy's flag, (d) blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of an enemy.

Thus Great Britain abandoned the right to capture enemy property in the ship of a neutral.

The Declaration was signed by Great Britain, France, Russia, Turkey, Sardinia, Austria and Prussia, and afterward acceded to by other powers, but the United States declined to sign it, presumptively, says Omond, because if privateering was abolished nations having powerful fleets would have the advantage, but offered to accede to the Declaration if capture of private property at sea, when not

12. 2 C. Rob. 174. 1 Roscoe's Prize Cases 212, 214.
13. Omond, p. 40.
14. Omond, p. 43; Taylor, p. 722.

contraband, was altogether forbidden. Our proposition was declined, so the Declaration applied only to its signers, and our ships when neutral could not carry enemy goods except at risk of capture.

Taylor, however, says as to our reason for refusal to sign the Declaration, that it was because it failed "completely to embody" the aspiration of our appeal of 1823.

So many articles had become conditional contraband that the British Foreign Office instructed Sir Edward Fry, delegate to the Second Hague Conference (1907) that the old rules of contraband were no longer satisfactory under changed conditions, and Great Britain was ready, instead of trying to frame more satisfactory rules for prevention of contraband trade to abandon the principle of contraband altogether, allowing free trade in neutral vessels between belligerents and neutrals to continue during war without restriction, subject only to its exclusion by blockade of an enemy's port; and she declared it to be the common interest of all nations to adopt such course. The British proposa was not accepted by the Conference.

In 1907 Sir Edward Gray informed Sir Edward Fry that Great Britain might even benefit by the adoption of the principle of immunity from capture.[15] This surpassed the Declaration of Paris which provided that the neutral flag might protect enemy goods except contraband; and now Britain was to abandon contraband altogether, and proposed that neutral merchantmen be free to trade with belligerents without restriction except exclusion from blockaded ports. The House of Lords vetoed the proposal of the Foreign Office to the salvation of the Entente and undoing of Germany in the Great War of 1914.[16]

Admiral Mahan says:[17]

> That arch robber, the first Napoleon, who so remorselessly and exhaustively carried the principle of war sustaining war to its utmost logical sequence, and even in peace scrupled not to quarter his arms on subject countries, maintaining them on what after all was private property of foreigners, even he waxes eloquent, and superficially most convincing as he compares the seizure of goods at sea, so fatal to his empire, to the seizure of a wagon traveling on a country road * * *.

Bower suggests that the Kaiser had the same objection to the seizure of goods at sea as had Napoleon, and for similar reason.

One proposal of the last Hague Convention was an international prize court, but inasmuch as the judges might not be able to determine what were the general principles of "equity and justice" which were to govern such court, and there were many differences of opinion as to what rules of law could be held generally recognized[18] it was deemed necessary to prepare a code of maritime law for the court. For that purpose a naval conference, attended by delegates of Great Britain, France, Germany, Russia, Italy, Spain, Holland, Japan and the United States met December 4, 1908, at the London Foreign Office. In three months they had compiled the "Declaration concerning the laws of Naval War," now known as "The Declaration of London." It was signed Feb. 26, 1909, and covered almost the entire field of law affecting neutral merchant shipping, e. g. contraband and blockade.

There was great difference of opinion regarding the Declaration and the naval prize bill providing procedure on appeals to the international court from the British courts in prize cases, and the Naval Practices Bill was withdrawn in November, 1910, but afterward brought in again and passed by the Commons on December 7, 1911, and rejected by the Lords December 12, 1911. Thus fell "The Declaration of London" and the International Prize Court.[19]

The Declaration of London, Article 22,[20] defined absolute contraband, and Article 24 defined conditional contraband; and Article 23 provided that other objects "exclusively used for war" might be added upon notice to the list of absolute contraband, and Article 25 that other articles "susceptible of use in war" might be added upon notice to the list of conditional contraband. The lists of contraband set out in Articles 22 and 24 were to exist in the absence of notice and be regarded as a complete enumeration.

In the absence of the "Declaration of London" there is doubt as to the right to enlarge the list of contraband.[21]

The British members of the London Conference had proposed a free list because it would place the matter beyond the power of belligerents thereafter to treat as contraband the raw materials of some of the most important British national interests along with harmless articles.

By the Declaration of London the doctrine of continuous voyage could not be applied to articles of conditional contraband.[22] They were subject to capture only if their destination for enemy's armed forces or government department was proved, and such destination was to be presumed only if the goods were traced to enemy's authorities, or to some man of business who as a matter of common knowledge, supplied articles of the same kind to the enemy, to a fortified place belonging to him, or to a base for his armed forces. In the absence of these presumptions the neutral ship's destination was presumed innocent, and her papers were to be taken as proof both as to her voyage and the port of discharge of her cargo, unless she was clearly outside her proper course and unable to explain the circumstances. The Declaration of London was not adopted by Great Britain, but a Royal Proclamation on August 5, 1914, announced articles which she would treat as contraband, and they corresponded to those of the Declaration of London; and by order in Council, August 20, 1914, it was announced that the Declaration of London would be put in force subject to certain alterations.

Under the London Declaration the destination of contraband was to be presumed from the position of the consignee or character of the "place of destination," but now the destination might be proved by any sufficient evidence. Under the former, conditional contraband was not liable to capture except on board a ship bound to an enemy country or its armed forces, and when not to be discharged at an intervening port, but now it could be captured at whatever port it was to be discharged.

Rubber, copper and metallic ores then on the

15. Bower 74; Cababe, p. 63.
16. Omond, p. 55.
17. Am. Jour. Int. Law, Vol. 13, No. 1, Jan., 1919, p. 63.
18. Omond, 53.
19. Omond 55.
20. Am. Journ. Int. Law, No. 2, April, 1914, pp. 307, *et seq.*; Omond, pp. 61, *et. seq.*
21. Taylor, p. 789.
22. Omond, 61.

free list were made conditional contraband, and on October 29, 1914, were made absolute contraband. From month to month fresh orders were made and more articles declared contraband. The Foreign Office had, on January 7th, 1915, declared that cotton was on the free list and that it was His Majesty's intention to keep it there; but on August 20, 1915, raw cotton and other articles were made absolute contraband, the German Government meanwhile, February 4th, 1915, having made its famous declaration that the English Channel and North and West Coasts of France were a war zone and that all enemy ships found in that area would be destroyed, and that neutral ships *might* be exposed to danger.

In the controversy between the Entente Allies and the United States it will be seen that they were at great disadvantage, for while we, notwithstanding we waived it in some treaties, had since the time of Benjamin Franklin, clamored for immunity of private property, even of enemy ownership, from seizure, Great Britain had wavered between the extremely harsh doctrine of earlier times and the radically liberal doctrine proposed by her at the Hague Conference, 1907, and the London Naval Conference, 1909. Whatever, therefore, her provocation by reason of the acts of Germany, or her right of retaliation upon Germany, the United States had some advanatge over the Entente Allies in the controversies between them over the seizure of our ships or cargoes, and our mails. Our disadvantage was that as a neutral we were forced to protect a trade with the Teutonic powers who were waging a war for the subjugation of all other countries, and the Entente Allies alone were opposing their audacious ambitions.

The Entente Allies were not bound by the Declaration of London, and, as above appears, had the right even by that Declaration to add upon notice to the lists of contraband, and the United States had not accepted the Declaration of Paris.[23] The Allies would, therefore, seem to have had the right under the Declaration to rescind their Orders in Council upon the same authority as that under which they made them, except to the extent forbidden by international law, as then understood, of treating harmless articles as noncontraband. The controversy, however, between us and the Entente Allies was waged largely after Great Britain in retaliation for the Teutonic Declaration of February 4, 1915, of a war zone covering the British Channel and parts of the French coast, had virtually declared all commerce with the Teutonic powers contraband and their ports all blockaded.

Indeed, the Entente Allies did not in their correspondence with us controvert our claims as to what was international law on the subject of contraband, although not entirely admitting our position as to blockade, but they justified their embargo on commerce with the Teutonic Allies upon the ground of retaliation for the intolerable proclamation of the war zone made by the Teutons, and upon the existence of the many devices concocted by our shippers to smuggle into Germany goods of divers kinds, some even absolute contraband.

Probably the surest ground upon which we stood was expounded by Mr. Lansing to Ambassador Page in his letter of October 21, 1915, in which he controverted the right of the Entente Allies to seize our vessels, or our goods, and take them to Entente ports for examination, and even at the expense of our shippers, with no excuse except that fraud had been practiced by American shippers and that goods contraband were continually pouring into Germany.

The Entente's position was that a presumption of illegality in neutral commerce had arisen from the circumstances just mentioned, and that the source of proof of the illegality was immaterial, but our response was that not only must the individual cases of certain shippers be considered, but also the indirect injury to all our trade, and that through the course pursued by the Entente Allies our foreign trade, innocent as well as illegal was suffering; and that the prize courts of the Entente Allies had no jurisdiction by virtue solely of their Orders in Council, but could derive jurisdiction only from international law, and that by such law the prize courts of belligerents were given jurisdiction only when visit and search disclosed from the cargo, or the ship's papers, sufficient evidence to indicate the presence of contraband, or that the vessel was bound for breaking a legitimate blockade.[24]

We further contended that even Orders in Council could not confer jurisdiction on the Entente's prize courts of the cases of vessels sailing the seas except in accordance with international law, because no government had the authority to make international law without the concurrence of other governments, and that such Orders in Council were *bruta fulmina*. On these points Mr. Lansing seems to have been incontrovertible, for the neutral government was certainly as powerful to declare the adverse doctrine as one of the Entente Allies was to declare the doctrine by us assailed. The Entente's advantage, however, was,

First, In the claim that Germany's declaration of the war zone was an infringement of neutral rights so much greater than was the Entente blockade that the failure to contest it licensed the Entente to retaliate without regard to the rights of the indulgent neutrals, and

Secondly, That while the Teutonic Allies outraged all neutral rights, not only of property but life itself, the Entente Allies only met by retaliation the illegal acts of the Teutons, but strictly observed the safety of life and committed as little injury to private property as possible, usually making compensation for the property taken and generally satisfying the owners thereof. Accordingly, Great Britain notified us that she had paid for meats seized on their way to well recognized German agents, and that the cargoes of cotton were seized in accordance with contract effected with the representatives of the cotton owners. She practiced preëmption.

What advantage, therefore, we may have had under strict international law was, through the tact, and moderation of the Entente Allies, and their readiness to compensate for the injury inflicted, offset, if not overcome, and, meanwhile, our controversy with the Teutonic Allies over the submarine atrocities, and the growing appreciation by our people of the designs of Germany and her outrages upon Belgium, France and other European countries overshadowed our quarrel with the Entente

23. Taylor, p. 728.

24. Letter of Sec'y of State to Ambassador W. H. Page, Oct. 21, 1915. Diplomatic correspondence continued on Contraband, Supp. Am. Journ. Int. Law, October, 1916, Vol. 10, pp. 85 *et. seq.*, Items 28, 29.

Allies until it was superseded by our entrance into the war with them against the Teutons.

(2.) Seizure of Our Mails

Our controversy over the Entente's interruption of our mails is akin to that just considered concerning merchandise. It involves the parcels-post packages and our foreign correspondence or dispatches.

a. The Entente's position that the parcels-post packages were like ordinary merchandise we had admitted in advance.[25]

Furthermore, the French Ambassador at Washington declared "it has not come to the knowledge of the Allied Governments that any protest touching postal correspondence was ever addressed to the Imperial Government." Some writers declared that where neutrals permit their rights to be ignored by one belligerent they must not discriminate against the other.[26]

b. Although similar, the case of correspondence stands upon grounds somewhat different from that of parcels-post packages. Our course is set forth by letter dated January 4, 1916, from Secretary Lansing to Ambassador Page.[27]

Mr. Lansing complained of the removal by the British of parcels-post mail from Dutch vessels; and of "the entire mails including sealed mails and presumably the American diplomatic and consular pouches from the United States to the Netherlands," December 23, 1915, and December 20, 1915, the latter still held by the British. He denied the right of the British to seize neutral vessels plying between American and neutral ports "without touching at British ports," to bring them into port, and, while there, to remove or censor mails carried by them. He said modern practice generally recognized that mails were not to be censored, confiscated nor destroyed on the high seas even when carried by belligerent mail ships. That to attain the same end by bringing such mail ships within the British jurisdiction for purposes of search and then subjecting them to local regulations allowing censorship of mails could not be justified on the ground of national jurisdiction.

The response of the Allies was made April 3, 1916, by M. Jusserand, enclosing a memorandum dated February 15, 1916.

The memorandum, as to parcels-post, mentioned four hundred revolvers for Germany in one package. As to correspondence it remarked that Germany had not only searched mails but sunk them, together with passengers and crew of the vessels carrying them, and that the neutrals had not protested. He mentioned quantities of rubber found in sealed envelopes and declared that the legal right of belligerents to exercise police powers over vessels was no less with regard to mail-bags than any other cargo, and that so late as 1907 the letters and dispatches themselves could be seized and confiscated.

M. Jusserand recalled that at the Hague Convention in 1907 Germany had urged the inviolability of the mails, and carried the point, upon the claim that war dispatches of real importance were sent by telegraph, intimating, apparently, that her action was in anticipation of smuggling war materials in sealed mails. He concluded: (1) that parcels-post was like other merchandise; (2) that the inviolability of postal correspondence stipulated in the Hague Convention did not impair the Allies' right to visit, and seize merchandise hidden in envelopes in mail-bags and (3) that the Allies would, "for the present" refrain "on the high seas from seizing and confiscating such correspondence, letters or dispatches, and will insure their speediest possible transmission as soon as the sincerity of their character shall have been ascertained."

In reply, Secretary Lansing wrote the British Ambassador May 24, 1916, that he did not consider that the Postal-Union Convention of 1906 necessarily applied to the *instant* case, that though admitting genuine correspondence to be inviolable, the Allies proceeded to deprive neutral governments of the benefit of such assurance

> by seizing and confiscating mail from vessels in port instead of at sea. They compel neutral ships without just cause to enter their own ports, or they induce shipping lines, through some form of duress, to send their mails *via* British ports, or they detain all vessels merely calling at British ports, thus acquiring by force or unjustifiable means an illegal jurisdiction. Acting upon this enforced jurisdiction, the authorities remove all mails * * * take them to London, where every piece, even though of neutral origin and destination, is opened and critically examined, to determine the "sincerity of their character" in accordance with the interpretation given that undefined phrase by the British and French censors. Finally the expurgated remainder is forwarded, frequently after irreparable delay, to its destination.

He declares that delays for even months thus arise.

Again, Mr. Lansing says that in our opinion, there is

> no legal distinction between the seizure of the mails at sea, which is announced as abandoned, and their seizure from vessels voluntarily or involuntarily in port.

He further claims that the Allies' methods violate the practice obtaining prior to the Hague Convention, and cites many authorities.

The British Ambassador rejoined October 12, 1916, with a confidential enclosure. He assented to our position regarding the Postal-Union Convention; and contended that the Allies' right of inspection could not be carried on properly at sea; wherefore, the vessels were taken to Allied ports. On our complaint of neutral vessels being taken to Allied ports the Ambassador responds that the Allies

> have never subjected mails to a different treatment according as they were found on a neutral vessel on the high seas, or on neutral vessels compelled to proceed to an Allied port, they have always acknowledged that visits made in the port after a forced change of course must in this respect be on the same footing as a visit on the high seas, and the criticism formulated by the Government of the United States does not therefore seem warranted.

He remarks, also, that the vessels voluntarily making Allied ports act without Allied compulsion and cites United States *v.* Diekelman,[28] as holding that merchant ships which spontaneously enter a foreign port thereby come under the laws in force in the port when martial law obtains there; and insists on the right of the port to make sure that the vessels carry nothing inimical to their national defense before granting clearance.

Regarding the Eleventh Convention of the Hague, 1907, he claims that it refers solely to mails found at sea and is foreign to those on board ships in ports, and, furthermore, notes that the Convention was not ratified by Bulgaria, Italy, Montene-

25. October, 1916, Supp. Am. Journ. Int. Law, Vol. 10, Special No., pp. 404. 418.
26. Omond, pp. 73, 4, citing Manning Com. Law of Nat. Ed. 1875. p. 430.
27. Supp. Am. Journ. Int. Law, Vol. 10, pp. 404 *et seq.* Special No. Oct., 1916.

gro, Russia, Servia, Turkey, etc., etc., but seems to insist that the Allies have conformed nevertheless to the intentions of the conference and that mails are forwarded as quickly as practicable. The Allies claim to have observed the Hague Convention without admitting its sanction.

Further, the Ambassador claims that no general rule previously prohibited

> belligerents from exercising on the open seas, as to postal correspondence, the right of supervision, surveillance, visitation, and, the case arising, seizure and confiscation, which International Law confers upon them in the matter of any freight outside of the territorial waters and jurisdiction of the neutral powers.

The ambassador cites the Hague report as to prior practice, namely:

> the seizure, opening the bags, examination, confiscation if need be, in all cases delay or even loss, are the fate usually awaiting mail bags carried by sea in time of war.

and cites authorities contrary to those invoked by Mr. Lansing. He declares regarding commercial correspondence of no interest affecting the war that the Allies have given instructions to see that it is forwarded with as little delay as possible, as far as practicable on the very ship on which it is found, or by a speedier route; and concludes that should abuses be disclosed to the Allies, they would be ever ready to settle responsibility therefor "in accordance with the principles of law and justice which it never was and is not now their intention to evade."

The foregoing issues make questions very difficult of solution. They involve: (a) the law prior to the Hague Convention of 1907; (b) the construction of that Convention; and (c) the application of the Hague Convention.

Nothwithstanding the force of the authorities cited by each side on the practice before the Hague Convention, it is difficult to escape the conclusion that under such practice a belligerent might search neutral vessels if grave suspicion of unneutral service existed. It is said by Cyc:[28]

> There had been a long controversy as to the right to visit and search mail ships and mails.

Cyc cites The Peterhoff, 5th Wall. 28, and our instructions to our blockading vessels June 29th, 1898, concluding in these words:

> The voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect to contraband or blockade.

Hannis Taylor says:[29]

> The fact that the neutral carrier is permitted to convey certain classes of mail matter does not deprive the belligerent of the right to search his mail-bags in order to ascertain whether or not he is engaged in the transportation of noxious despatches.

He quotes our Civil War Regulations that:

> Public mails of any friendly or neutral power, duly certified or authenticated as such

found on captured vessels

> shall not be searched or opened, but be put, as speedily as may be convenient, on the way to their destination. This instruction, however, will not be deemed to protect simulated mails verified by forged certificates or counterfeited seals.

He says that in the case of The Peterhoff, when the court ordered the mails opened in the presence of the British Consul, who was requested to select such letters as appeared to him to relate to the cargo and its destination, and then forward the remainder, he refused to comply on the ground that the entire mail should be forwarded unopened; that the United States Attorney was directed to pursue that course notwithstanding there was reason to believe that there were some letters in the pouches containing evidence as to the cargo.

Taylor cites Hall as believing that nothing better can be done than concede immunity to mail bags as a general rule, subject to the belligerent's rights "to examine the bags upon reasonable grounds of suspicion being specifically stated in writing."

In our Spanish War regulations we allowed mail steamers interfered with when there were "the clearest grounds of suspicion of violation of law in respect of contraband or blockade."[30]

In the case of The Panama,[31] although the present question does not arise, the court's declarations seem to indicate that mail might be examined upon just suspicions.

The general subject is discussed in Naval College Suggestions.[32] The discussion of Topic V. is elaborate, is based upon an extensive review of authorities and concludes:

> 3. That as the interests of neutrals may be involved in such seizure, the mails should, so far as regular, be forwarded without delay. This refers to belligerent mail vessels.
>
> 5. Innocent neutral vessels carrying mails should be exempt from seizure.

When, therefore, we recall the Hague Conference report, invoked by the British Ambassador as to the former practice, namely,

> the seizure opening the bags, examination, confiscation if need be, in all cases delay or even loss, are the fate usually awaiting mail bags carried by sea in time of war,

it is difficult to escape the conclusion that our case against the Allies could not be made out unless under the Eleventh Hague Convention, 1907.

Our case, however, was not rested by our Secretary of State solely upon that Convention, as above appears. It provides:[33]

> The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay. The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

This Convention would seem to sustain our position if in force between Allies and us, and if it applied to vessels touching at Allied ports while remaining there.

We took the position that the Convention was controlling in the controversy, but the Allies avoided taking a decided position on the subject, although intimating that the Convention might not be binding because not ratified by Bulgaria, Italy, Montenegro, Russia, Servia, Turkey, and claiming nevertheless that the Allies had essentially complied with the Convention. The Convention seems to resolve the question in our favor as to vessels cited on the high seas, and it is difficult to understand why we claimed that the Allies had taken to their ports vessels so cited unless such statements were true. The British claims on this point are not satisfactory, because while they declare that they did not treat vessels compelled to enter their ports differently from their treatment of them on the high seas, they admitted that they required such vessels to enter ports for examination be-

28. 92 U. S. 520.
28. 40 Cyc. 345.
29. § 668, p. 750, 1.
30. 40 Cyc. 345, n. 21.
31. 176 U. S. 535.
32. 1904, p. 103, 1905, p. 59, 1903, p. 68, Article 20, Naval War Code, 1900 and 1906, p. 88, Topic V.

cause of their inability to make the examination properly at sea. The inviolability of the mails seized upon the high seas would, therefore, seem to have been infringed.

The case of examination of neutral mails carried by vessels voluntarily entering British ports seems different from that of such mails seized upon the high seas or forced by the Allies into their ports, and United States *v.* Diekelman,[34] appears to support the British contention on the instant point, and Wildenhus's case,[35] reaffirms the doctrine of the Diekelman case. Unless, therefore, the Hague Convention aforesaid affects the rule of the Diekelman case, the point as to the mails examined in an Allied port on a vessel voluntarily entering it would seem against us. Mr. Lansing, however, declares, as aforesaid, that there is

> no legal distinction between the seizure of the mails at sea, which is announced as abandoned, and their seizure from vessels voluntarily or involuntarily in port.

If this statement be sound it would seem to rest upon an interpretation of the Hague Convention aforesaid, and a critical examination of that convention and of the discussions upon which it is based would be beyond the scope of this paper.

(Concluded in January issue)

33. 40 Cyc. 345, n. 22.

FEES AND SCHEDULES OF CHARGES

By Ralph R. Hawxhurst
*Of the Chicago Bar**

THE fees charged by professional men, especially lawyers, is a subject concerning which very little is written and much spoken. It is even conservative to state that the spoken word concerning said fees is not always complimentary.

The opinion of many laymen, in jest or otherwise, seems to be to the effect, in general, that lawyers as a whole charge not illiberally for their services and that no two lawyers charge alike, it being largely a question of which is the higher charge. There is even a large body of laymen who feel that many lawyers charge excessively for the service performed. This is unfortunate, and should be remedied, if possible. On the other hand, the lawyer, especially the young lawyer, is met with a serious problem at times in fixing a fee for services which shall fairly compensate him for his work, be satisfactory to his client, and not be out of proportion to the charges made by other counsel in like matters.

The many elements which enter into the make-up of a proper legal fee distinguish it markedly from any other character of compensation. There is the magnitude of the interest involved; the intricacy of the subject matter; the actual time spent upon the matter; the condition or peculiar relation of the client; the success or lack of success achieved in the particular case; the financial results obtained; the constructive benefit of the work done, or the contrary, and the like, all of which must be taken into consideration and a portion of which may not be understood by the layman in many instances. The young lawyer is particularly at a loss in many cases, in view of his inexperience in matters of this kind, how to do justice to himself and be fair to his client.

With this in mind, the Illinois State Bar Association appointed a committee in 1916 entitled "Committee on Fees and Schedules of Charges," as a guide to new members of the Bar. This committee held several meetings and prepared a schedule of charges covering almost every item that could be considered. The schedule was duly adopted by the Board of Governors and was duly printed and widely distributed.

In 1919 a new committee on fees and schedules of charges was appointed, who carefully revised the previous schedule of 1916, and, after due consideration, increased the schedule approximately 33⅓% over the previous schedule prepared. This increase was believed to be justifiable in view of the increased expense of conducting an office, the increased cost of living, and the general increase throughout every nation in the world, not only in matters of compensation but in all other matters connected with daily life; in other words, the decreased value of the dollar as a medium of exchange. This second schedule was duly approved by the Board of Governors and adopted and is now in print.

About the same time (1919) the different Bar Associations of the different States, realizing the value of such a schedule, began to appoint committees to consider this subject, and a great many of the States have adopted such a schedule of fees and charges. Many of them are based upon the Illinois Fee Schedule, as prepared by the Bar committee, and there has been a great demand, not only in this State but outside of this State, for copies of this schedule, in view of the detail in which the matter of fees is set up and the apparent careful consideration given to the entire matter.

It is to be understood that the schedule of charges, as prepared and now adopted, does not *attempt to fix the lawyer's fee*; it is merely a guide to the *minimum* fee which should be charged in a particular class of work, or a particular item of business. The fees to be charged by lawyers in the opinion of many, including the said committee, should not be less than the fee specified in the schedule. Any one of the elements mentioned above or many others might enter into the fixing of a fee and make the fee very much larger in the particular instance, but the advantage of the schedule lies in the fact that it furnishes a starting point upon which to base the fee, and that it furnishes the lawyer, especially the young lawyer, with information of which in many cases he is entirely ignorant as to the general belief of his profession in regard to the value of the particular kind of service performed.

This subject is really one of paramount interest and, while there is a natural reticence in most professional men to discuss a matter of this kind with the frankness with which they would discuss the price of wheat, it is submitted that a more thorough discussion and understanding of the matter of proper fees among members of the Bar would not

*Chairman of the Committee on Fees and Schedules of Charges of the Illinois State Bar Association, 1919-1920.

only be advantageous to the lawyers themselves, but to their clients as well.

It is further submitted that the general adoption of fee schedules with their proper revision from time to time is an invaluable aid to lawyers in properly fixing their fee from a standpoint both of fair compensation, and of complete justice to their client. A movement along this line should be well supported by all lawyers who have the interest of their profession at heart.

For the benefit of those who may be interested in the subject the Illinois "Schedule of fees as a guide to new members of the bar" of which Mr. Hawxhurst speaks, is printed below. Of course, it does not pretend to be of general application, having been adopted by the Illinois Association for the guidance of Illinois lawyers. However, the schedule, which goes into greater detail than most of them, has a legal news value as showing how one large State Association has worked out a problem which is undeniably of interest to State and local organizations.

FOREWORD: It is assumed that each licensed attorney will give prompt, faithful and intelligent attention to the legal business intrusted to him, and as compensation for his services will be entitled to not less than the fee specified in this schedule.

In classifying the counties the committee has followed the classification provided by statute for Court fees, i. e. first class counties, those containing a population not exceeding 25,000, second class counties containing a population over 25,000 and not exceeding 100,000 and third class counties containing a population exceeding 100,000.

	1st Class Counties	2nd Class Counties	3rd Class Counties
United States Circuit Court of Appeals.			
Appearance and Brief, at least	$100.00	$100.00	$135.00
Per Diem, at least	75.00	75.00	100.00
United States District Court.			
Appearance and Brief, at least	75.00	75.00	100.00
Per Diem, at least	50.00	50.00	100.00
In Bankruptcy Matters.			
Where no Assets above Exemption and no Contest, at least	75.00	75.00	100.00
Where Contest, or where there are Assets above Exemption (Fee fixed by Court)	100.00	135.00	200.00
Filing Claim with Referee. If Collection is made, add Collection fee.			
Appearance before Referee in Support of Petition, Motion or Rule, and Order thereon, and the time spent in preparation, whether the matter be contested, or uncontested, same fee as near as may be as Probate Court Matters.			
Appearance before Referee at Creditors' Meeting by direction of client, and actively participating in the proceedings, same per diem as in United States District Court.			
State Courts.			
Supreme Court of Illinois, Direct Appeal	135.00	175.00	400.00
Appellate Court of Illinois, Appearance and Brief, at least	100.00	135.00	300.00
Appellate and Supreme Courts, through both, at least	200.00	250.00	550.00
Circuit or Superior Courts.			
Retainer, at least	35.00	35.00	75.00
Trial, per Diem, at least	35.00	50.00	75.00
All cases of Partition and Foreclosure, and all other cases where there is a sale of real estate, at least, in any case	60.00	75.00	200.00
And upon excess of $500 to $2,000 add	8%	8%	8%
And upon excess of $2,000 to $5,000 add	6%	6%	6%
And upon excess of $5,000 to $15,000 add	4%	4%	5%
And upon excess of $15,000 to $30,000 add	3%	3%	4%
And upon excess of $30,000 to $50,000 add	2%	2%	3%
And upon excess over $50,000 add	1%	1%	1%
Foreclosure of Chattel Mortgage, Statutory or Common Law Lien on Personal Property, at least	30.00	35.00	75.00
Assignment of Dower and Homestead, at least	60.00	75.00	135.00
Bills for Specific Performance, Vendor's and Mechanic's Lien, same fees as in Partition and Foreclosure cases, based upon the fair value of the matter in controversy	....	....	200.00
Creditor's Bill, at least	75.00	75.00	175.00
Bill to dissolve Partnership and for Accounting, at least	75.00	75.00	175.00
Bill for Accounting, at least	75.00	75.00	175.00
Injunction (when not auxiliary), at least	75.00	75.00	175.00
Injunction (when auxiliary) except in Divorce cases, at least	35.00	35.00	135.00
Divorce or Separate Maintenance, Default, at least	35.00	50.00	100.00
Same with Injunction, Default, at least	50.00	60.00	100.00
Divorce or Separate Mainteance, with Contests, at least (Add per diem in Cook County.)	75.00	80.00	135.00
Drawing Bill in all other cases, at least	35.00	35.00	50.00
Appearance in Chancery cases, at least	15.00	25.00	35.00
Appearance and Answer or Plea, at least	30.00	35.00	75.00
Answer of Guardian ad litem, at least	15.00	15.00	35.00
Drawing Exceptions to Answer, at least	15.00	25.00	35.00
Drawing Special Demurrer, at least	15.00	25.00	35.00
Drawing Pleas, at least	15.00	25.00	35.00
Drawing Petition, Affidavit, and Notice, at least	15.00	25.00	35.00
Preparing and arguing Exceptions, Motions	20.00	30.00	50.00
Preparing and arguing Exceptions, Motions or Demurrers which decide case, at least	35.00	50.00	75.00-135.00
Attendance before Master, per day, at least	20.00	35.00	50.00
Drawing Interlocutory Decree, at least	20.00	20.00	35.00
Drawing Final Decree, at least	30.00	35.00	50.00
Drawing Exceptions or Objections to Master's Report, at least	15.00	20.00	35.00
Attendance at Master's Sale, per day, at least	15.00	20.00	35.00
Drawing Declaration, except Narr, on notes or Common Counts, at least	20.00	30.00	50.00

Appeal from Justices, at least.	15.00	25.00	35.00
Affidavit and Bond in Attachment or Replevin, at least.	15.00	25.00	35.00
Preparing Bill of Exceptions or Certificate of Evidence, at least	35.00	50.00	75.00-100.00
Judgment by Confession on Power of Attorney, at least	25.00	25.00	35.00
If collection is made, add collection fees.			
Obtaining Judgment by Default in Assumpsit or Debt, at least	25.00	30.00	50.00
Scire Facias, to Revive Judgment, same as obtaining Judgment.			
Defense in Case of Felonies, in addition to per diem, at least	75.00	75.00	135.00
Defense in cases of Misdemeanors, in addition to per diem, at least	35.00	35.00	50.00
Recognizance to keep Peace, at least	15.00	25.00	30.00
Petition for Discharge as Pauper Criminal, gratis, or at least	25.00	30.00	35.00
COUNTY COURTS.			
The fees specified for services in the Circuit and Supreme Courts shall apply to the County Court as far as applicable.			
Preparing objections to taxes, including resisting application for Judgment and Order of Sale for delinquent taxes, at least	25.00	25.00	35.00
Not less than $5.00 to each party usual fee if trial.			
Preparing Objections to special assessment or special tax, at least	25.00	25.00	35.00
Not less than $5.00 to each party, usual fee if trial.			
Insanity Cases, prosecuting or defending, at least	30.00	35.00	75.00
Adoption Proceedings, at least	30.00	35.00	75.00
PROBATE COURTS.			
Drawing Petition and Attendance Probating Will (no contest), at least	30.00	35.00	50.00
Same, when contested at least	50.00	50.00	75.00
Contesting Probate of Will, at least	35.00	35.00	75.00
Drawing Petition and obtaining Letters of Administration or Guardianship, at least	15.00	25.00	50.00
Drawing Inventory, at least	15.00	15.00	25.00
Preparing Notices and Attendance Claim Day, at least	15.00	15.00	25.00
Drawing and Presenting Report other than Final, at least	15.00	15.00	35.00
Drawing Final Report and obtaining Discharge, at least	15.00	25.00	50.00
Proving or Contesting Heirship, at least	15.00	15.00	25.00
Drawing Petition for Sale of Real Estate and Proceedings relative thereto, at least	60.00	75.00	100.00
In case property sold brings more than 500, add additional fees as provided in cases of partition and foreclosure, in the Circuit Court.			
Attendance at Sale of Real Estate or Personal Property, at least	15.00	25.00	35.00
Petition and Order for Sale of Personal Property, at least	15.00	25.00	35.00
Drawing Report of Sale of Personal Property, and Order approving same, at least	7.50	7.50	25.00
Citation to discover assets, at least	15.00	15.00	35.00
Trial of Citation to discover assets, at least	35.00	35.00	35.00-75.00
Drawing Exceptions or Objections to Report, Inventory or Appraisement Bill, at least	15.00	15.00	35.00
Proceedings for Appointment of Conservator, at least	30.00	35.00	75.00
Defense in Conservator case, at least	30.00	35.00	75.00
Minimum Guardian ad litem fee, at least	25.00	25.00	35.00
Where no Will and Estate is simple, entire proceedings, at least	50.00	60.00	135.00
Where a Will and Estate is simple, entire proceedings, at least	75.00	75.00	145.00
All other fees in the Probate Court, including per diem for trial, shall be the same as it is provided for the Circuit Court, so far as the same are applicable.			
SPECIAL PROCEEDINGS.			
Quo Warranto, Mandamus or Writ or Prohibition, at least	75.00	80.00	150.00
Ne Exeat, at least	75.00	80.00	150.00
Habeas Corpus, at least	75.00	80.00	135.00
Certiorari (only in lower courts), at least	75.00	80.00	135.00
Bastardy Proceedings, as special attorney for State, no defense, at least	35.00	50.00	75.00
Bastardy Proceedings, defending, at least	50.00	75.00	100.00
Proceedings for Capias ad respondenum or ad satisfaction, at least	50.00	75.00	100.00
JUSTICE COURTS.			
Trial in City, Village or Township where attorney resides or has an office, in civil cases, at least	15.00	15.00	15.00
Criminal Examination and Bastardy Cases, at least	25.00	25.00	35.00
Outside of City, Village or Township in which the attorney resides or has an office, add to each of the above	15.00	15.00	25.00
ROAD CASES.			
Petition and Notices, at least.	50.00	75.00	....
Trial before Commissioners, Justice of the Peace or Supervisors, per day, at least	35.00	50.00	....
LEGAL SERVICES BEFORE BOARDS, COMMITTEES, ETC.			
Appearance and Argument before City Council or any of its committees, or before any board or officer of the City, at least	25.00	35.00	75.00
Same before Board of Supervisors or County Commissioners or before any Co. Board, Committee or Officer, per day, at least	25.00	35.00	75.00
Same before General Assembly or any of its Committees, or any Board, Department, or Officer of the State, at least, per day	50.00	75.00	100.00
In addition to the above, in matters before the Board of Review, 10% of the net amount saved in taxes by reason of reduction in assessment.			
Appearance before the State Public Utilities Commission, at least	50.00	75.00	100.00

Acting as Arbitrator under Workmen's Compensation Act, at least	15.00	25.00	15.00-75.00
Appearance in contested matters before Industrial Board or Committee or Arbitrators, per day, at least	35.00	50.00	75.00
Outside of the Village, City or County in which the attorney resides or has an office, add to each of the above	15.00	15.00	35.00
MISCELLANEOUS.			
Drawing Will or Codicil in its simplest form, at least	7.50	7.50	15.00
Drawing Deed and taking acknowledgment, at least	2.00	2.00	7.50
Drawing Mortgages and Notes, at least	3.50	7.50	15.00
Drawing Leases, Articles of Agreement or Bond for Deed (in duplicate), at least	3.50	7.50	15.00
Legal advice without consultation of authorities, at least	4.00	7.50	15.00
Time necessarily devoted to briefing questions of law or fact as the basis of legal advice or opinion per diem, at least	25.00	35.00	35.00-135.00
Examining Abstracts of Title, at least	7.50	15.00	25.00
Attendance taking Deposition inside County, per day, at least	35.00	50.00	75.00
Same, outside County, per day, at least	50.00	60.00	100.00
Procuring License to Incorporate and Chapter, at least	35.00	50.00	75.00
Drawing By-Laws and completing organization, at least	35.00	50.00	75.00
Procuring Incorporation of City, Village or Town, at least	100.00	135.00	400.00

SCHEDULE OF COLLECTION CHARGES:

15% on first $300.00.
8% on excess to $1,000.00.
4% on excess of $1,000.00.
Minimum fee $5.00.
Claims under $10.00, 50%.
Minimum suit fee, $7.50 plus commission.

To the foregoing percentages should be added the proper fee for legal services in the courts, if suit is brought.

Claims collected by repeated duns, demands or notices, or in installments should be made a matter of contract at not less than the above rates.

On all business forwarded by one attorney to another, one-third of the fee to forwarder and two-thirds to receiver.

No division of fees should be made without the knowledge of the client who pays them.

Oil Royalty Rights After Land Partition

In the case of Musgrave vs Musgrave, et al., (S. E. Rep. 302) the Supreme Court of West Virginia decided a question in regard to oil royalties, where a tract of land has been partitioned after a a lease made, that is of real interest to the profession. It held:

> Where the owner of a tract of land leases the same for oil and gas development, and dies before any operations are conducted thereon under such lease, leaving a will by which he divides said tract of land into several parcels, and devises to each of his children one of such parcels, and the lessee in such oil and gas lease subsequently produces oil or gas from some of such subdivisions, the present owner of each of the subdivisions from which such oil or gas is produced will be entitled to receive the rents and royalties arising from the production from the subdivision owned by him.

This question has been before the West Virginia Court several times. In Campbell vs. Lynch (81 W. Va. 374; L. R. A., 1918, B 1070) it was held that where the former owner of a large tract of land leased it for oil and gas development, and died before any work was done under the lease and his heirs at law partitioned the land among themselves, the result of any development thereafter upon the land inured to the benefit of all the heirs, regardless of the subdivision from which the oil or gas was produced. This decision was by a divided court. Subsequently when practically the same question was presented in the case of Pittsburg & W. Va. Gas Co. vs. Ankrom (83 W. Va. 81; 97 S. E. 593) it was held, by a divided court again, that the oil produced belonged to the owner of the tract or subdivision of the land upon which the well was located. This holding is again followed in the Musgrave case, supra, by a divided court. There are long opinions and dissents in all of these cases, but the majority opinions in the last cases seem to be sound and are supported by Northwestern Ohio Nat. Gas Co. vs. Ullery, 68 Ohio State 259, 67 N. E. 494; Osborn vs. Arkansas Territorial Oil & Gas Co., 103 Ark. 175, 146 S. W. 122; Fairbanks vs. Warrum, 56 Ind. App. 337, 104 N. E. 983-1141; Kimberly vs. Luckey (Okla.) 179 Pac. 928; Pierce vs. Oil Co. (Okla.) 181 Pac. 731. The Supreme Court of Pennsylvania seems to be the only Court holding otherwise. Wettengel vs. Gormley, 160 Pa. 559, 40 Am. St. Rep. 733. MASON G. AMBLER.

State Transfer Tax Case

A recent decision of general interest in New Jersey is the decision of the Court of Errors and Appeals in the suit between Bugbee, Comptroller, and Roebling, Executor, which decides that under the Transfer Tax Act of New Jersey the amount of the Federal inheritance tax must be deducted before the State transfer tax is imposed. There was a conflict of opinion between the Comptroller's office and a recent decision in the Court of Chancery. The Comptroller insisted on imposing the tax on the whole value of the estate, without allowance for deduction of the tax imposed by the federal government. The Court of Appeals holds otherwise. Justice Swayze, in writing the opinion of the Court, says:

> It must be conceded that if the contention of the State is correct, the beneficiaries are compelled to pay as tax the statutory percentage on the value of assets that are subject to the lien of the Federal government, which is paramount to any claim of the beneficiaries. In other words, as argued by counsel, the State tax to that extent is a tax upon a tax. The difficulty cannot be avoided by treating the Federal tax as an estate tax and the State tax as a succession tax. Disguise the situation as we may by the use of different names, we cannot avoid the fact, which must be painfully real to the legatees, that the same property bears a double burden. If each tax were fifty per cent, it would not help the legatees to be told that one tax was on the estate and the other on the succession; the estate and the succession would both be deprived of beneficial value to the legatees.

There is no need of quoting further. The opinion will be found and cases cited in 111 Atlantic Reporter, page 29.

EDWARD Q. KEASBEY.

FEDERAL DECISIONS ON INDIANA COAL REGULATION

Remembering the conditions of the preceding winter, the legislature of the State of Indiana in special session, July, 1920, passed an act creating a Special Coal and Food Commission, to investigate and control the coal situation until March 31, 1921, when the commission is to cease to exist. The act provides for a tax of one cent per ton on all coal mined and for mining and dealer's licenses. The license fees and tax are paid into the state treasury and the money used to pay the expenses of this commission. The act gives the commission power to compel all persons engaged in the coal business to produce for the inspection of the commission their books, records, accounts and papers. The commission is to determine the amount of coal needed in the State of Indiana and to require operators in the State of Indiana to produce and offer for sale within the state a sufficient quantity to supply domestic demands. The commission is to "fix the price at which all coal moving in intrastate commerce in the State of Indiana shall be sold, both to jobbers, wholesale and retail coal dealers and to the public." The act provides that "this price shall not be less than the actual cost of the coal plus a fair and reasonable return on the property used in the production and sale thereof," and that "the cost of production, including all reasonable and proper expenses for operation, maintenance, depreciation and depletion," and "a just and reasonable profit" are to be included in the price fixed.

The American Coal Mining Company has taken to the United States Supreme Court an appeal from the decree of the United States District Court which refused a preliminary injunction. In an oral opinion in which Judges Evans, for the seventh Circuit, and Geiger, for the Eastern District of Wisconsin, concurred, Judge Baker stated: "all aspects of the bill are premature except this one on the general power of the State. We are satisfied that the general power of the State to touch, in some way, the coal industry, exists." The court cited laws regulating the coal industry in regard to conditions under which miners shall work, laws regulating rentals and others which "have no basis at all except upon the power of the people to restrict the theretofore existing circle in which a person has had his life, and the one within which he had his liberty, and the one within which he had his property, to bring these down narrower on account of conditions that were found to be oppressive to the people." In cases based on franchises and the exercise of eminent domain, the court says, "There never has been any doubt that the proper remedy was to say that 'all you shall obtain shall be a fair return.'" And as to the remedy we find this statement:

> There is no distinction as to the source of power of regulation. It all comes from the police power. Dividing that into the two subject-matters upon which police power operates—the one based on the public franchise and the like, and the other upon abuses of the theretofore existing right of private contract or private property—when in the one case you find that the evil to be cured is extortion and the remedy is price regulation, then in the other case when extortion is also found to be the evil you should apply the known remedy for extortion. The power is one; the evil is the same evil; and the remedy is drawn from the same reservoir, though from different faucets. There is no infringement of the right of a man to hold property, if, under the power of eminent domain, it is taken from him for a public use and the fair value of it is paid to him. That is a constitutional thing, and there is no objection to it. So, when it comes to regulating the returns that he shall receive from his property, that is not taking his property; it is simply a control of his property as an instrument in his hand, with which the legislature has found that he has been bludgeoning the people.

A number of retailers have appealed to the Circuit Court of Marion County from the prices fixed by the commission. A provision of the act makes such appeals take "precedence over other business of the court" and directs that they "shall be tried expeditiously."

A temporary restraining order has been issued by Judge Anderson of the District Court of the United States for the District of Indiana, forbidding the commission to revoke the licenses of two companies. The basis of the petition before the court was that the orders of the commission compelling the shipment of coal to needy communities interferred with their interstate traffic. The court at the same time held that the commission could not issue emergency coal orders compelling petitioners to ship coal when petitioners had railroad contracts for all of their output.

From the decisions handed down at this time by the United States District Court for Indiana, it seems that the court considers the coal business now one of "those businesses affected with public interest," and the problem before the courts has passed from whether or not the state can regulate to how far this regulation can properly be extended.

Warsaw, Ind. EVERETT E. RASOR.

Indemnity and Punishment

The opinion in United States v. Ollerdessen, decided by the United States Court for China, of which Charles S. Lobingier is Judge, affords an illustration of the possibilities of simple and substantial justice in a jurisdiction which is not hampered with a jury. In that case the defendant was charged with involuntary manslaughter, but the element of negligence was comparatively slight. The defendant had, while his attention was momentarily diverted, run into a canvas shed, erected for repair purposes in the middle of a road, and killed a Chinese employee therein. The defendant pleaded guilty and professed willingness to make such restitution as lay within his power for the damage done to the widow and five children of the unfortunate

In view of the circumstances of the accident, and particularly in view of the fact that the prosecution joined with the defense in urging that no sentence of imprisonment be imposed—the widow naïvely remarking, "what good will it do me to have this man sent to prison? That will not feed me and my children"—Judge Lobingier decided that more effective justice would be done all around by the imposition of a moderate fine on the defendant, and acceptance of his agreement to make provision for the family of the deceased. He added:

> "Our law is lame in that it makes no provision for indemnifying the injured party in the criminal proceeding. The civil law is more effective in this particular, for it requires a judgment in favor of such party as a feature of the sentence. This obviates the necessity of two trials—one to enforce the criminal liability, and the other the civil. In a case like this, where there was a clear absence of criminal intent and where the negligence was at most slight, the civil liability becomes the principal feature, and if we can dispose of it in this proceeding, it will be to the obvious advantage of all concerned."

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest. Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.

ARIZONA

Judge John H. Campbell of Tucson was elected President of the Arizona Association at the meeting recently held at Phoenix. James E. Nelson of Phoenix was re-elected Secretary-Treasurer. The main subject for discussion at the annual meeting was "Professional Ethics."

It was generally agreed that the Arizona method of admitting attorneys was lax and that there should be a change, particularly with reference to applicants presenting credentials from another state. At present a motion by a local practicing attorney and the presentation of a license from another state are all that is required to admit such applicant to the bar.

A report on revision of the Constitution and by-laws of the Association, permitting a broader membership and giving to each county a vice-president and an added council of two members, was presented by Charles H. Rutherford.

CONNECTICUT

The annual meeting of the State Bar Association of Connecticut will be held at New Haven on January 10, 1921.

A special committee consisting of Thomas Hewes of Farmington, chairman; F. H. Wiggin of New Haven, Thomas M. Steele, of New Haven, Allyn L. Brown of Norwich and David S. Day of Bridgeport has been working for nearly a year on proposed legislation to effect some of the reforms suggested in the report of Mr. Smith to the Carnegie Foundation on "Justice and the Poor."

The afternoon session will be largely devoted to a discussion of bills to provide for Small Claims Courts, Legal Aid and other reforms suggested in Mr. Smith's report.

There will be an address by the Hon. Simeon E. Baldwin, former president of the American Bar Association and former Chief Justice of Connecticut, on Hon. William Hamersley, former Justice of the Supreme Court of Connecticut, in whose office the State Bar Association was formed.

IDAHO

At the recent election the proposed constitutional amendment increasing the number of Justices of the Supreme Court from three to five received the vigorous support of the Idaho State Bar Association and was carried by a substantial majority. Hon. Charles P. McCarthy, of Boisé, now one of the district judges of the third judicial district, and William A. Lee, of Blackfoot, were elected to the two new offices for terms of four and six years, respectively. Hon. Robert N. Dunn, of Coeur d' Alene, at present judge for the eighth judicial district, was elected to the place occupied by the Hon. William M. Morgan, whose term expires this year.

The executive committee of the Idaho State Bar Association has designated January 13, 14 and 15, 1921, as the date for the next meeting of the Association, which will be held in the Federal Court room at Boisé. The program is now being arranged, and will be announced shortly.

KANSAS

The thirty-eighth annual meeting of the Kansas State Bar Association was held in Wichita, November 22 and 23. It was the first time in the history of the Association that its meeting has been held outside of the State Capital. It proved to be a wise move; over 300 members were in attendance and 165 new members were reported.

The following officers were elected:

President, Ben S. Gaitskill, Girard; Vice-President, Chester I. Long, Wichita; Members of Executive Council—C. M. Williams, Hutchinson; Ed. S. McAnay, Kansas City; James A. Allen, Chanute; Charles L. Hunt, Concordia; Secretary; W. E. Stanley, Wichita; Treasurer, Paul J. Wall, Wichita. Delegates to the American Bar Association: H. A. Russell, Ft. Scott; E. C. Flood, Hays, and Chester Stevens, Independence.

The question of Pardons and Paroles came before the association, and the paper of Judge C. W. Smith of Topeka, in charge of Pardons and Paroles in the Executive Office, was referred to the Committee on Amendment of Laws, with the recommendation to the Legislature that a separate Board be created to care for Pardons and Paroles, having the right to call witness to give testimony under oath. This proposed Board is to be separate from all other departments, with the authority and duty to make full investigation in the community where the crime occurred, thus eliminating mere ex parte presentation by friends. Warden J. K. Codding, of the State Penitentiary made a report on the working of the present Parole law.

The proposal to retire Judges on compensation was not given favorable consideration.

The matter of declaratory judgments was referred to the Judiciary Committee for special consideration with a view of recommending some legislative action upon the subject.

The question of the incorporation of the State Bar Association was referred back to a Special Committee for further consideration and report.

The proposition that the State Association have a Journal of its own was reported on unfavorably by a Committee, and the opinion was expressed that the Journal of the American Bar Association gave space to proceedings from various states and would fill the necessary need.

The Child Welfare Program was approved by the Association and an effort will be made to procure legislation along this line.

The Hon. Albert J. Beveridge of Indiana was

the guest of the Association and delivered two masterful addresses, one on Monday evening to the public as well as the Bar, on the development of the Constitution under John Marshall, and the second one Tuesday evening at the banquet on Marshall, the Man.

The principal feature of the banquet was the long continuous service of Chief Justice Johnson, it having appeared, so far as investigation would disclose that he has had a longer continuous period of service than any other Justice of an Appellate Court in the history of the United States with one exception, Chief Justice Cole of Wisconsin, who served 36 years and 6 months. Chief Justice Johnson's term of service at present is 36 years and his present term of office will not expire until January, 1923.

The next meeting of the Association will be held in Hutchinson, Kansas, at a time to be fixed by the Executive Committee.

MINNESOTA

Very interesting and instructive was the annual meeting of the Minnesota State Bar Association held at St. Paul, August 3, 4, and 5. President Albert R. Allen delivered an address on "Citizenship," and there was an address by Judge Carroll A. Nye, of Moorhead, on "The Legal Profession and its Relation to Present Day Problems"; by Nathan Wm. MacChesney, of Chicago, on "Self Government and Self Determination: Is the Bar Entitled to It?"; by Charles W. Farnham of St. Paul, on "Theodore Roosevelt"; by Morris D. Mitchell on "The Bar Association's Part in Increasing the Efficient Administration of Justice;" by William G. Graves of St. Paul, on "Lawyers and Their Fees Under Existing Conditions."

Of special significance was the report of the Committee on Legal Education, which recommended that a diploma from a High School giving a four year's course, or the equivalent of a four year's High School education, be required from all applicants for admission to the bar; that only graduates of approved law schools be admitted to examination for the bar; that, however, during the continuance of the system permitting men to study in the offices of practicing attorneys for three years and then take bar examinations, each lawyer who takes such students into his office be required to register that fact with the Secretary of the State Board of Bar Examiners, and that applicant's period of study date from such registration; that four years of such study be required instead of three years as at present; that the Supreme Court be requested to modify the list of subjects in which the examinations are given, so as to stress the more important subjects; that the State Board of Bar Examiners consist of three members who shall receive adequate salaries payable from the state treasury.

All of these recommendations were adopted as proposed, with the exception of number two, which was changed so as to read:

> Resolved that the rules for admission to the bar through examination should be changed so as to permit the examination only of graduates of approved law schools and of those applicants who have studied the requisite period in the office of a practicing attorney of this state, and present proofs sufficient to the Supreme Court that their study and education have been adequate and under proper supervision.

After a statement by Mr. Shoonmaker on the subject of declaratory judgments, the meeting adopted a resolution expressing the sense of the body that the principle of declaratory judgment should be enacted into law.

Another resolution was passed declaring it to be the sense of the meeting that a bill authorizing the establishment of a Conciliation and Small Debtors' Court in all cities in the state should be passed by the legislature. Mr. Fred W. Reed, chairman of the committee to draw the bill in question, offered the resolution.

On recommendation of the Committee on Illegal Practice of Law, the Association adopted a resolution in favor of limiting the practice in Probate Courts, including the drawing of pleadings, petitions or other documents or papers, except petitions for allowances to widows and minors, to persons duly admitted and licensed to practice law in the state. However, devisees or legatees appearing on their own behalf or on behalf of relatives, minor children or other incompetents would still retain the privilege of presenting their cases.

The meeting also approved bills prohibiting the solicitation of legal business by attorneys and regulating the conduct of claim agents, and provided for the appointment of a special committee of five to attempt to have these bills enacted into law. It also provided for the appointment of a committee of three to confer with judges and referees of the United States Court in an effort to obtain a rule which will prohibit the solicitation of claims in bankruptcy estates.

Resolutions also were passed approving the incorporation of the entire bar of the state, with full power over and discipline of members. A further resolution provided that the chairman of the Committee on Incorporation be required and instructed to prepare a bill along lines of that adopted by the American Judicature Society, and report such bill to the meeting of the board of governors to be held not later than December 31, 1920, at which all members of the Association who wished should have the privilege of appearing and taking part in the discussion.

The following officers were elected for 1920: President, Ambrose Tighe, St. Paul; Vice-President, William D. Bailey, Duluth; Treasurer, Roy H. Currie, St. Paul; Secretary, Chester L. Caldwell, St. Paul; Librarian, Elias J. Lien, St. Paul.

President Ambrose Tighe has recently sent out a general letter to members of the Association, pointing out ways in which the organization can render service. The approaching legislative session, in his opinion, furnishes a useful occasion and opportunity for immediate activity on the Association's part. He emphasized the fact that the cooperation of all its members was necessary in order to make these efforts of the Association effective.

MASSACHUSETTS

The annual dinner and meeting of the Massachusetts Bar Association took place in Boston, December 10 and 11. Frederick P. Fish, President of the Association, presided at the dinner, and Arthur A. Ballantine, of New York, formerly solicitor of internal revenue at Washington, spoke informally on current practical aspects of Federal taxation.

At the meeting on the following day the Association met in the State House to elect officers for the following year and transact other business. At

the conclusion of the regular business program there was a discussion of the relation of the present tendencies of Federal government and the principle of local self government.

The November number of the Massachusetts Law Quarterly, published by the Association, is entirely devoted to a collection of portraits, so far as they exist, of all the Justices of the Superior Court of Judicature and the Supreme Judicial Court of Massachusetts. These are simply different names of the same court, since 1699. It forms a unique picture of the tribunal during its entire existence. It is issued as a continuation of an earlier account of the constitutional history of the Supreme Judicial Court of Massachusetts, which appeared in the May, 1917, number of the Massachusetts Law Quarterly.

NEBRASKA

The movement in the Nebraska State Bar Association for organization of the Bar of the State through legislative enactment has unfortunately been commonly called a movement for the incorporation of the bar. As a matter of fact it has none of the earmarks of a corporation. The question started at the 1916 annual meeting of the association when the then president, Hon. C. J. Smyth, now a member of the Federal Court for the District of Columbia, in his annual address, recommended and later moved the appointment of a special committee with direction to prepare the draft of an act for the organization of the bar of the state under legislative authority, and to report the same to the following meeting of the association, preliminary to its submission to the legislature. The committee, accordingly, reported a tentative draft of the proposal to the 1917 annual meeting of the association with the recommendation that the same be thoroughly considered and discussed by the members of the bar but that no final action be taken until the 1918 meeting.

The proposed draft act calls for the organization of the bar of the state under legislative enactment, giving to the organization full and complete self governing powers, including discipline and disbarment of members. Every lawyer of the state is by force of the act included and subjected to the provisions thereof. Persons not qualified or who are or may be subsequently disqualified are denied the privileges and rights of an attorney. Upon complaint of unprofessional conduct provision is made for a complete hearing before the governing board of the association or organization, with right of appeal direct to the Supreme Court.

Because of the unprecedented nature of the proposition, the offering of the committee included details to a considerable extent, and this for the purpose of submitting the subject in all its angles with the view of drawing out a full and complete discussion pro and con. At the session of the first discussion almost everybody took the "con" side in the debate that followed. The question was finally put over to the next annual meeting of the association, with the committee continued under direction to prepare a pamphlet containing the proposed draft act, together with arguments both for and against the proposition. At the second discussion, in 1918, the proposal had many bitter opponents and also many warm defenders. Final action was again deferred one year, with the committee continued under instructions similar to those of the previous year. A printed copy of the proposal was again mailed to every lawyer of the state with an invitation to each to attend the coming meeting and make suggestions for changes or in opposition to the proposition. Judge Goodwin, of the American Bar Association, having the same matter under consideration, was the guest of the 1919 session of our association when the proposal was up for discussion for the third time. After an all-day discussion of the subject the association adopted a resolution favoring the general plan for such a bar organization.

Inasmuch as the legislature would not convene until January of 1921, the committee was again continued with directions again to send copies of the draft act to all lawyers of the state inviting written suggestions or proposals for changes and adverse criticisms. From the results of this invitation the committee was to redraft the act in final form for introduction in the forthcoming legislature, the same to be reported to the coming general meeting of the lawyers of the state called to meet December 27 and 28.

The committee has received practically no definite or written suggestions, though verbal and personal and indefinite suggestions have been numerous.

Since this proposition was first offered there has been a very marked change of sentiment among the members of the bar in favor of some such an organization. The subject, of course, offers a most fertile field for debate. The first and probably the principal objection is the compulsory inclusion of all members of the bar. It is charged that this is an invasion of the individual right of the lawyer. It is also earnestly asserted that the constitutional inhibition against the legislative creation of special corporations prohibits such an organization. Strong and bitter objection is advanced against the provisions relating to discipline and disbarment, charging that the proposal placing these matters in the hands of the bar is an invasion of the functions of the judiciary. Various details are also attacked. It is expected that the whole subject will again be thoroughly thrashed over at the coming annual meeting the last week of this month at which all members of the bar of the state are invited and urged to attend. The legislature meets in January, and if the proposition can be agreed upon in both substance and detail, the matter will undoubtedly be submitted for legislative action.

This is the fourth annual discussion of this question by the members of the State Association and also the members of the bar generally. At the first proposal the proposition had few, if any, friends, while its enemies were numerous and united. Members of the committee which prepared the document were more or less lukewarm, proceeding chiefly because they were functioning under a direction to prepare the act with no alternative. With few exceptions, the general attitude of the bar of this state has been to hold the question pending the incubation period of a determination.

Advocates of the proposition argue that unless every lawyer of the state is included by force of the act there can be no responsive or responsible representation of the profession, and that no real corrective advantage can come from a mere voluntary

bar organization. They meet the "special corporation" argument by asserting that the proposed act does not assume to create a corporation; it is given none of the powers or functions of a corporation, but is merely an effective plan for the proper regulation of a well recognized branch of the court; that lawyers are in fact mere officers of the court and as such may properly be subjected to reasonable regulations as proposed. The offerings of details are matters of more or less personal opinions and are generally so considered.

The fact that several of the other state bar associations have taken up this general subject has undoubtedly been a very great factor in bringing the whole question to consideration of the members of the bar of this state.

J. H. BROADY.

NEW YORK

The next annual meeting of the State association will be held in New York City, January 21 and 22, 1921. The business sessions will be held at the building of the Association of the Bar of the City of New York. The annual address will be given by Hon. George Sutherland of Washington on the evening of January 21 and the annual dinner in the Hotel Astor the evening of January 22. The principal topic for discussion on the last day of the meeting will be the reforms introduced in the new civil practice act and rules of civil practice, which become effective April 15, 1921.

OHIO

The Mid-Winter Meeting of the Ohio State Bar Association will be held at Toledo, Ohio, January 28 and 29, 1921.

While the entire program of the meeting has not been completed, President Daniel W. Iddings, of Dayton, announces that George Gordon Battle, of New York, has agreed to deliver an address on "The Actual Trial of Cases." Judge John W. Warrington, who recently retired from the United States Circuit Court of Appeals, will address the Judicial Section of the Association.

In view of the fact that at this meeting the Committee on Incorporation of the Ohio Bar is to make its report, invitations have been extended to Judge Clarence N. Goodwin, of Chicago, a member of the Committee on Incorporation of the American Bar Association, and to the Presidents of the Bar Associations of New York, Indiana and Pennsylvania, to be present and participate in the discussion of the subject of incorporation.

The present plans for a program for this meeting also contemplate a consideration of efforts at the last session of the Ohio Legislature dealing with the problem of taxation. There is to be a discussion of the systems and methods heretofore considered and rejected by the Legislature, as well as of any new ideas to meet the present needs of the State that may be advanced.

The action of the Cincinnati Bar Association in endeavoring to secure the annual meeting of the American Bar Association at Cincinnati has been endorsed by the officers of The Ohio State Bar Association. In the event it is held there, the Ohio Association will hold its meeting at the same place, either immediately before or after the national Association meeting.

OREGON

At the recent meeting of the Oregon Bar Association, the following officers were chosen: President, H. G. Platt, Portland; Secretary, Albert B. Ridgeway, Portland; Treasurer, Hall B. Lusk, Portland. Vice-Presidents: F. M. Calkins, Medford; J. W. Hamilton, Roseburg; Percy R. Kelly, Albany; James U. Campbell, Oregon City; Robert W. Phelps, Pendleton; John W. Gavin, The Dalles; Gustave Anderson, Baker; Dalton Biggs, Ontario; John W. Knowles, La Grande; David Parker, Condon; Harry H. Belt, Dallas; Delmon V. Kuykendall, Klamath Falls; Judge Batcheller, Lakeview; T. E. J. Duffey, Prineville; George H. Bagley, Hillsboro; James A. Eakin, Astoria. Executive Committee: Fred W. Wilson, E. O. Immel, Robert Maguire, Charles J. Schnabel and Hugh Montgomery.

SOUTH CAROLINA

The next meeting of the South Carolina Bar Association will be held in Columbia, January 27 and 28. Arrangements are under way to make the meeting the best gathering the Association has ever had. Hon. James Hamilton Lewis of Illinois has accepted an invitation to deliver the annual address.

Officers of the Association are: President, William D. Melton; Secretary, C. S. Montieth; Treasurer, Alfred Wallace.

TENNESSEE

The Tennessee Bar Association is proceeding splendidly and quite a number of local Bar Associations are being organized as adjuncts. The outstanding feature of the Bar Association in this State is the development of a high standard of ethics among the Bar members.

Another feature of our work is constructive reformation of our laws, thanks to an aggressive Legislative Committee of the Association.

The standard of the Association is unusually high at present and for that reason we have no trouble in getting new members. In the last two or three years many of the lawyers have fallen into line with the work.

VERMONT

The forty-third annual business meeting of the Vermont Bar Association will be held at Montpelier, Tuesday afternoon, January 4, 1921. There will be the usual routine of committee reports and election of officers. Following the business meeting, the central theme will be "Bar Associations." At the afternoon session, it is expected the President will deliver his annual address, and that there will also be an address by Chief Justice John H. Watson. The evening session will consist of a banquet, with further addresses, at which time it is expected the following will be the principal speakers: Hon Moorfield Storey, of Boston; former Chief Superior Judge Eleazer L. Waterman, Justice Leighton P. Slack, Congressman Frank L. Greene, Attorney General Frank C. Archibald and Walter S. Fenton, Esq.

The officers of the Vermont Bar Association are: President, Marvelle C. Webber, Rutland; Secretary and Librarian, George M. Hogan, St. Albans; Treasurer, Erwin M. Harvey, Montpelier.

LETTERS FROM BAR ASSOCIATION MEMBERS

Declaratory Judgments

New York, Dec. 6.—To the Editor: In view of the recent decision of the Supreme Court of Michigan in reference to declaratory judgments, let me call your attention to the statement annexed by Judge Hughes to the last report of the Committee on Jurisprudence and Law Reform.

The report itself and the statement of Judge Hughes, which I think convinced the committee, concur that where there is an actual controversy between parties it is competent for the Legislature to confer upon the Court power to determine it. The question whether or not litigation has actually begun is unimportant. The real point in the Michigan decision is that there was no actual controversy between the parties. It would seem to be clear that where there is such a controversy it is a judicial function to decide.

Judge Hughes was on the bench of the Supreme Court at the time of the decision in the Muskrat Case, (Muskrat vs. U. S., 219 U. S. 346), to which the committee and he referred, and his opinion as to the scope of that decision is therefore entitled to especial weight. He is clear that it does not apply to a case where there is an actual controversy.

The whole committee of this Association on Jurisprudence and Law Reform, comprising fifteen lawyers from different parts of the country, all men of prominence at the bar, concurred in the opinion that, wherever there was an actual controversy, jurisdiction to decide it could be conferred upon the Court whether or not any litigation had been begun. The first paragraph of the report on this subject states the conclusion concisely:

> For centuries, the right of courts of equity, in the administration of trusts, to give instructions to trustees, desiring assistance of the court, has been recognized, but the development of civilization and the great consequent extension of business have shown the necessity of extending this power so as to enable parties between whom a controversy has arisen to submit the same to the court before any breach by one of the contract between them, as construed by the other party, has occurred. The case is not uncommon where the parties differ as to their respective rights and a controversy on that subject has arisen between them, but there has as yet been no breach, so that under the existing system no cause of action has arisen.

EVERETT P. WHEELER.

Infusing Austerity With "Pep."

Denver, Col., Dec. 2.—To the Editor: As a member of the association, and a lawyer who has temporarily fallen by the wayside into the literary field, I want to heartily congratulate you upon the new "Journal." I believe that it is going to put a lot of "pep" into this splendid, but somewhat austere profession of ours. I believe that it is just the thing we need most for the advancement of the association. I earnestly hope that the paper will not be desiccated by eliminating pictures and articles of general interest as has been suggested by some of the members. Since the Supreme Court has sustained the Eighteenth Amendment, things are quite dry enough.—JOSEPH SAMPSON.

City Bar Associations

Scranton, Pa., Dec. 2.—To the Editor: I suggest that your Department headed "Activities of State Bar Associations" be amended to read "Activities of State and Local Bar Associations." The activities of some of the Associations of the larger cities are well worth the attention of the Bar at large.

It would be interesting, for instance, if some persons familiar with the facts would tell us of the recent experiences of the Bar Associations of St. Louis and New York City in the election of Judges.—W. J. FITZGERALD.

Fills Its Field

Washington, D. C., Dec. 1.—To the Editor: The Journal grows in my favor each month. It is filling admirably its own chosen field. I find in it the educational, the theoretical, the practical and the historical in the right proportions. I am particularly pleased with the editorials.—L. T. MICHENER.

Favors Consolidation

St. Louis, Mo., Dec. 4.—To the Editor: Recently we had a meeting of the American Bar Association in St. Louis, Mo.; today we are having a meeting of the Missouri Bar Association in St. Louis, and each month we have a meeting of the St. Louis Bar Association in St. Louis.

Why should we have three distinct and separate associations (Bar Associations) in the State of Missouri, or in any other state, for that matter? Why should we pay dues to three different associations?

Don't you think that the time is now ripe for the consolidation of all the Bar Associations in the United States, under the name of the American Bar Association, having, for instance, a St. Louis Council, Chicago Council, etc., leaving the same officers in charge until the next elections?

This, of course, would not prevent a State organization of all the Branches of the American Bar Association in, for instance, Missouri.

This would eliminate in the State of Missouri the loss of time and the trouble of joining three distinct organizations, and would require the payment of dues to only one organization.

It seems to us that by eliminating the dues paid to two of the organizations we could afford to increase our dues in the American Bar Association; and perhaps in that manner the Journal would secure a larger fund from which to draw.

Would you care to submit this plan through the Journal to the attorneys in the United States.—E. J. HOULIHAN.

Cincinnati Desires Next Annual Meeting

Cincinnati is desirous of securing the next annual meeting of the American Bar Association. At a recent meeting of the local Bar Association a resolution was passed directing the President to appoint a committee to go to New Orleans personally to extend to the Executive Committee, which meets there in January, an invitation to hold it in Cincinnati. President Province M. Pogue has appointed Hon. John Galvin, Mayor of Cincinnati, Hon. Simeon M. Johnson, Hon. Rufus B. Smith, and Hon. Sidney G. Stricker on the committee.

The Executive Committee of the Ohio State Bar Association recently passed a similar resolution. Hon. D. W. Iddings, of Dayton, President of the Ohio State Bar Association, will accompany the committee of the Cincinnati Association to New Orleans to speak for the State organization.

Necrology

John Franklin Fort

John Franklin Fort, formerly Governor of New Jersey and Justice of the Supreme Court, died at his home in South Orange on November 17. He was a member of the American Bar Association. He was distinguished as a lawyer and as a Judge and prominent in public affairs. Governor Fort's family came to this country from Wales in the settlement of West New Jersey in 1677 and he was born in Pemberton, New Jersey, in 1852. His uncle, George Fort, was the Governor of New Jersey. He took the degree of L.L.B. in the Albany Law School in 1872, a classmate and chum of Alton B. Parker. He was admitted to the Bar of New Jersey in 1873. Before he was admitted to practice he exercised his abilities as a public speaker in a vigorous campaign for General Grant in the Presidential election, and this was only the beginning of the exercise of his abilities in political campaigns as well as at the Bar. He chose the City of Newark for the practice of the law, and in 1878 he was appointed Judge of the First District Court, an office which did not preclude an active practice in the higher courts. He resigned in 1886 and after ten years was appointed President Judge of the Court of Common Pleas, and in 1900 a Justice of the Supreme Court. In the meantime he had been industrious and successful at the Bar both in jury trials and in arguments before the courts of law and equity and prominent in public and political affairs. He took an active personal interest in the matter of prison reform and the probation of prisoners. He made an investigation of the subject in Europe and brought about the passage by the New Jersey Legislature of a bill providing for a system of probation. He was a delegate to five National Republican Conventions—delegate at large to some of them—and it was he that made the speech nominating Garret A. Hobart as Vice-President in 1906.

In 1907 he was chosen Governor of his state. He insisted upon a progressive platform and favored popular measures. There was in his administration legislation for a public utilities commission, for a body of experts to revalue railroad property, for a commission to recommend a Workmen's Compensation Law; an act modifying the liability of employers for accidents, an extension of the direct primaries to county committees of the political parties, and acts for the regulation of corporations. He did not hesitate to veto bills which he considered against the interest of the people. He was an active leader in the Progressive movement and was recognized as such by Mr. Roosevelt. Mr. Fort was delegate at large to the National Republican Convention in 1908 and supported Mr. Taft, but in 1912 he was selected to nominate Colonel Roosevelt for temporary chairman and was afterwards made chairman of the state committee of the Progressive party in New Jersey. In August, 1914, he was appointed by President Wilson as the head of a peace commission to investigate the conditions in Santo Domingo, and the next year he was sent to Hayti on a similar errand. The following year he was appointed by the President a member of the Federal Trade Commission, and in July, 1919 he was elected chairman of the commission. But his health was failing. The commission held a meeting at his house in South Orange, New Jersey, and in October of that year he resigned and gave up all work, after a long and useful life of incessant and varied activity.

Thomas R. Jernigan

Thomas R. Jernigan, former Consul-General at Shanghai, charter member of the Far Eastern American Bar Association, member of the American Bar Association, and for many years a practicing lawyer in Shanghai, died recently. Resolutions passed by the Shanghai branch of the Far Eastern American Bar Association were read at a session of the United States Court for China on November 8, and were, by order of Judge Lobingier, spread on the minutes of the court. In giving this unusual testimony to the professional and personal character of the deceased, Judge Lobingier said that "the late Mr. Jernigan's career was, on the whole, so unusual and his relation to this Court so unique that its records would be quite incomplete without a memorial of him."

Mr. Jernigan's first consular post was Kobe at a time when our consuls exercised extra-territorial jurisdiction in Japan. In 1893 he was made Consul-General at Shanghai, where he was called upon to discharge extensive judicial functions. His experience there convinced him of the necessity of the absolute separation of such functions from ordinary duties, and the establishment of a distinct and independent tribunal. This attitude he maintained consistently, "as an earnest advocate of the final, though long delayed step, but recently taken, which was necessary to complete the unification of the American Judiciary in Shanghai."

Mr. Jernigan was one of the first to be admitted to the Bar of the United States Court for China, and his was the second name on the roll of attorneys. He took very seriously the lawyer's position as an officer of the court and was ever ready to assist in the due administration of justice in any way possible. He was particularly interested in the "Comparative Law School" in the city of his residence and delivered a series of lectures on great lawyers, beginning with some of the Roman lawyers, following with great English jurists, especially Lord Mansfield, and concluding with Chief Justice Marshall. He was particularly interested in the life of the last named jurist, and read everything upon the subject which he could obtain.

Statesmen Are Shoemakers

As to government, all discontent springs from unjust treatment. Idiots talk of agitators; there is but one in existence and that is injustice. The cure for discontent is to find out where the shoe pinches and ease it. If you hang an agitator and leave the injustice instead of punishing a villain you murder a patriot.—*Sir Charles Napier.* Quoted in Chicago Legal News.

When You Tell an Anecdote

It was DeQuincey who said that all anecdotes are false and all dealers in anecdotes tainted with mendacity. He also added that "rarer than the Phoenix is that virtuous man who will consent to lose a prosperous anecdote on the consideration that it happens to be a lie."—*National Corporation Reporter.*

"Due Process" and Georgia Tax Act

The Georgia Tax authorities received quite a jolt recently when the United States Supreme Court reversed a ruling of the Georgia Supreme Court about the Georgia Tax Equalization Act.

In accordance with the provisions of that Act (Laws 1913, 123) a taxpayer returned property for taxation at a certain valuation; the Board of Assessors, without hearing, raised the assessment and gave notice of the increase; the taxpayer demanded arbitration which failed because the arbitrators could not agree on the value of the property. Thereupon, under the statutory requirement that unless the arbitrators rendered their decision within ten days the Board's assessment should stand, payment was demanded upon the increased valuation fixed by the Board. Alleging that he had been subjected to the increased assessment without proper notice and hearing, the taxpayer sought to enjoin collection of taxes thereunder.

In reversing the Georgia verdict the U. S. Supreme Court held that notwithstanding Section 6 of the Tax Act provided for notice to the taxpayer after assessment was made, and in event of his dissatisfaction the arbitration was to afford him a hearing, such notice and hearing did not afford a proper opportunity for the taxpayer to appear and be heard upon the extent and validity of the assessment against him, and the Board's assessment should have been enjoined because the Act, as construed and applied in this case, denied due process of law to the taxpayer.

It is not considered that this will affect the Act otherwise than on this particular point.

J. H. MERRILL.

The Greatest Peril

"The greatest peril to self-government is at all times to be found in the want of zeal and energy among the citizens. This is a peril which exists in democracies as well is in despotisms. Submission is less frequently due to overwhelming force than to the apathy of those who find acquiescence easier than resistance."—*Bryce.*

Professional Cards

The Journal will for the present print professional cards of members of the Association, classified by states, about thirty to the page, for $3 per month. Those desiring to avail themselves of this opportunity will kindly send in copy not later than the 5th in order to get into the issue of the Journal for that month.

LEGAL DIRECTORY